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Misc. No.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

RICHARD DANNY TICHNELL

and

JAMES ARTHUR CALHOUN,

Petitioners

v.

STATE OF MARYLAND,

Respondent

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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APPENDIX A

Opinion of the Court of Appeals of Maryland in Tichnell v. State, 287 Md. 694, 415 A.2d 830 (1980), filed on June 10, 1980 ..... A.1

RICHARD DANNY TICHNELL v. STATE OF MARYLAND

[Nos. 73 and 104, September Term, 1979.]

Decided June 10, 1980.

CRIMINAL LAW — *Multiple Offenses — Joinder For Trial — Multiple Offenses May Be Tried Together Where They Are Based On Same Act Or Transaction Or On Connected Acts Or Transactions Or Constituting A Common Scheme Or Plan — Maryland Rules 712 a, 745 a.* Where three indictments charged defendant with storehouse breaking, grand larceny of handguns, first degree murder, felony murder and related crimes, and with robbery of police officer with a deadly weapon, grand larceny of a police cruiser and handgun violations, and where all of the alleged offenses occurred within a fifteen minute period in a tightly confined area, the Court *held* that the trial judge did not abuse his discretion in consolidating the indictments for trial. In the Court's view, joinder was proper under Maryland Rule 745 a because all of the offenses charged were related and were "based on the same act or transaction or on two or more acts or transactions connected together . . . ." pp. 709-713

APPEAL — *Failure To Raise Issue Below — Ordinarily, Appellate Court Will Not Consider Issues Which Appellant Failed To Raise At Trial — Alleged Prejudicial Removal Of Criminal Case For Trial In Another County Will Not Be Considered On Appeal Where Appellant Made No Objection To Removal In Lower Court — Maryland Rule 885.* pp. 713-714

CONSTITUTIONAL LAW — *Trial By Jury — Maryland Declaration Of Rights Guarantees Trial By Impartial Jury — But Defendant Does Not Have Right To Be Tried By Any Particular Jury Or Jurors — Removal Of Criminal Case From Garrett County To Wicomico County For Jury Trial Did Not Deprive Defendant Of Trial By Jury Of His Peers — Maryland Declaration Of Rights, Articles 21, 24.* p. 714

CRIMINAL LAW — INSTRUCTIONS TO JURY — *Failure To Object To Instructions Precludes Review As Of Right — Maryland Rule 757 — But Appellate Court May Review Instructions Which Are Plainly Erroneous — No Plain Error In Trial Court's Instructions On State's Burden Of Proof On Defendant's Claim Of Self-Defense.* In the instant case, the jury was instructed: "The State has the burden of proving . . . every fact necessary to convict the defendant of the crimes with which he is charged. This burden remains with the State throughout t.. trial. The defendant does not have

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the burden of proving his innocence or producing any evidence." The Court *held* that this instruction was not plainly erroneous on the State's burden of proof pertaining to the defendant's claim of self-defense. pp. 714-715

EVIDENCE — *Objection To Admissibility — Waiver Of Objection — Party May Waive Objection To Admissibility Of Evidence By Allowing Similar Evidence To Be Admitted Without Objection Or By Giving Testimony Which Confirms Evidence To Which Objection Was Made — Maryland Rule 522 d 2.* Where defendant in criminal trial objected to testimony of witness tending to show that defendant had committed other crimes during flight after crimes with which he was charged, but where defendant did not thereafter object to the introduction of his statements to police which recounted the crimes committed during flight, and where defendant's own testimony confirmed the statements he had made to police, the Court *held* that the defendant had waived his objection to the contested evidence and its admission was not reversible error. Maryland Rule 522 d 2. pp. 715-716

MURDER — *First Degree — Sufficiency Of Evidence — Record Evidence Must Reasonably Support Finding Of Guilt Beyond Reasonable Doubt.* Where the evidence adduced at trial provided ample basis for the jury to find that defendant had a specific purpose and intent to kill, had full conscious knowledge of the purpose to kill and that the design to kill preceded the killing by an appreciable length of time; and where the jury could have reasonably concluded from the evidence that the defendant did not kill in self-defense, the Court *held* that there was sufficient evidence, under the test of *Jackson v. Virginia*, 443 U.S. 307, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979) to convict the defendant of first degree murder of police officer. pp. 717-720

CONSTITUTIONAL LAW — CRIMINAL LAW — *Death Penalty Statute Held Facially Constitutional — Code (1957, 1976 Repl. Vol., 1979 Cum. Supp.) Art. 27, §§ 412-414; Maryland Rule 772A.* Reviewing the history and provisions of Maryland's "death penalty" statute, enacted in 1978, the Court *held* the statute constitutional under the Eighth Amendment of the U. S. Constitution and under Article 25 of the Maryland Declaration of Rights. This legislation is not a mandatory death penalty statute. It allows for a broad consideration of mitigating circumstances, and provides clear guides and standards to the sentencing authority. Moreover, the statute incorporates safeguards against arbitrariness through an expedited automatic appeal of all death sentences to the Court of Appeals. pp. 720-729

CRIMINAL LAW — *Death Penalty — Burdens Of Proof — Statute Requires Sentencing Authority To Find Beyond Reasonable Doubt That State Has Proved At Least One Aggravating Circumstance — Accused Then Has*

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Burden Of Production And Proof That Mitigating Circumstance(s) Exist — Death Sentence Must Be Imposed Unless Sentencing Authority Finds By A Preponderance Of Evidence That Mitigating Circumstances Outweigh Aggravating Circumstances, And State Has Risk of Nonpersuasion On This Issue — Code (1957, 1976 Repl. Vol., 1979 Cum. Supp.) Art. 27, §§ 413 (f), (g), (h) (2). pp. 729-734

CONSTITUTIONAL LAW — CRIMINAL LAW — *Maryland's Death Penalty Statute — Due Process Does Not Require State To Assume Burden Of Proving Beyond Reasonable Doubt Absence Of Mitigating Circumstances Or Of Proving Beyond Reasonable Doubt That Aggravating Circumstances Outweigh Mitigating Circumstances — Code (1957, 1976 Repl. Vol., 1979 Cum. Supp.) Art. 27, § 413.* pp. 729-734

CONSTITUTIONAL LAW — CRIMINAL LAW — *Ex Post Facto Laws — Defined As Statute Which Punishes As A Crime An Act Previously Committed Which Was Innocent When Done — Or Which Increases Punishment For Crime After Its Commission — Or Which Deprives Defendant Of Defense Available At Time Act Was Committed — Procedural And Ameliorative Change In Death Penalty Statute Is Not An Ex Post Facto Law — Maryland Declaration Of Rights, Article 17.* Where Maryland death penalty statute was amended after defendant's offenses, but before his trial, to increase a defendant's safeguards by directing the sentencing authority to consider, "any other facts which the jury or the court specifically sets forth in writing that it finds as mitigating circumstances in the case", the Court *held* that such procedural and ameliorative amendment was not an *ex post facto* law and did not violate Article 17 of the Maryland Declaration of Rights or the *ex post facto* clause of the federal Constitution. Code (1957, 1976 Repl. Vol., 1979 Cum. Supp.) Art. 27, § 413 (g) (8). pp. 734-737

CONSTITUTIONAL LAW — *Death Penalty Statute — Claim That Article 23 Of Maryland Declaration Of Rights Vests Jury With Power To Disregard Statutory Sentencing Criteria Not Presented Where Defendant Elected To Have Judge Make Sentencing Determination — Code (1957, 1976 Repl. Vol., 1979 Cum. Supp.) Art. 27, § 413; Maryland Rule 757 b.* pp. 737-738

CRIMINAL LAW — *Death Penalty Statute — Judicial Review Of Death Sentence Imposed Under Influence Of Arbitrary Factor — Case Remanded For New Sentencing Proceeding — Code (1957, 1976 Repl. Vol., 1979 Cum. Supp.) Art. 27, § 414 (e) (1).* Where it appeared that defendant selected trial judge as sentencing authority rather than jury because defendant was prejudicially misled to believe that the judge would not impose the death sentence if he were the sentencing authority, the Court *held* that the imposition of the death penalty was influenced by an "arbitrary factor", justifying a new sentencing proceeding. Code (1957, 1976 Repl. Vol., 1979 Cum. Supp.) Art. 27, §§ 414 (e) (1), 413. pp. 738-745

J. A. A.

Review of Sentence of Death and Appeal from the Circuit Court for Wicomico County (POLLITT, J.).

Richard Danny Tichnell was found guilty by a jury of first degree murder, grand larceny and storehouse breaking. Tichnell waived his statutory right to a jury determination of whether he should be sentenced to death on the murder conviction, and the court imposed the death sentence as well as terms of imprisonment for the other crimes. From those convictions and sentences, Tichnell exercised his direct statutory appeal to the Court of Appeals.

Judgments affirmed, except as to the imposition of the death sentence. Death sentence vacated, and case remanded to the Circuit Court for Wicomico County for a new sentencing proceeding under Article 27, § 413. Each party to pay own costs.

The cause was argued before MURPHY, C. J., and SMITH, DIGGES, ELDRIDGE, COLE, DAVIDSON and RODOWSKY, JJ.

Clark B. Frame, with whom was *G. Gary Hanna* on the brief, for appellant.

George E. Burns, Jr., Assistant Public Defender, with whom were *Alan H. Murrell, Public Defender*, and *Thomas J. Saunders, Assistant Public Defender*, on the brief, for the Office of the Public Defender as *amicus curiae*.

Stephen H. Sachs, Attorney General, and *Deborah K. Handel, Assistant Attorney General*, for appellee.

MURPHY, C. J., delivered the opinion of the Court. COLE and DAVIDSON, JJ., concur in the result and filed concurring opinions at page 745 *infra*.

In the early morning hours of January 18, 1979, Richard Tichnell and a confederate, Oscar Recek, broke into Davidson's Army-Navy Surplus Store near Oakland, Garrett County, Maryland, and stole ten handguns. Within

A. 1

minutes after leaving the store. Tichnell was accosted by Deputy Sheriff David Livengood, who had been dispatched to the scene in response to a silent alarm activated by the storehouse breaking. In the course of their encounter, Tichnell shot and killed the deputy. Thereafter, Recek and Tichnell took Deputy Livengood's police cruiser and fled the scene. They were apprehended later that morning in West Virginia. At that time Tichnell admitted to the police that he had shot Deputy Livengood, but he said the shooting was not premeditated and was in justifiable self-defense.

On March 2, 1979, the grand jury of Garrett County charged Tichnell in one indictment with the felonious storehouse breaking of Davidson's store, and with grand larceny of the ten handguns.[1] Another indictment charged Tichnell with the premeditated first degree murder of Deputy Livengood, with felony murder, with murder in the second degree, with manslaughter, and with using a handgun in the commission of a crime of violence.[2] A third indictment charged Tichnell with robbing Deputy Livengood with a deadly weapon and stealing his vehicle, with grand larceny of the deputy's police cruiser, and with a handgun violation.

Upon Tichnell's request for a change of venue, the cases were removed to the Circuit Court for Wicomico County. The three indictments were consolidated for trial by jury before Judge Richard M. Pollitt. Pursuant to Maryland Code (1957, 1976 Repl. Vol., 1979 Cum. Supp.), Art. 27, § 412 (b), Tichnell was given timely notice that the State would seek the imposition of the death sentence for the murder of the deputy sheriff.

At the conclusion of the trial on August 23, 1979, the jury found Tichnell guilty of the wilful, deliberate and

1. The storehouse breaking count was based on Maryland Code (1957, 1976 Repl. Vol.), Art. 27, § 32 — breaking a storehouse with intent to steal goods of the value of $100 or more.

2. Code, Art. 27, § 407 provides that murder perpetrated "by any kind of wilful, deliberate and premeditated killing shall be murder in the first degree." Section 410 provides that murder committed in the perpetration, or attempted perpetration, of a felonious storehouse breaking or robbery shall constitute murder in the first degree.

premeditated murder of Deputy Livengood. It also found him guilty of storehouse breaking, grand larceny of the guns, and unauthorized use of the deputy's vehicle. After Tichnell waived his statutory right to have a jury determine whether he should be sentenced to death on the murder conviction (*see* Code, Art. 27, § 413), the court imposed the death sentence. Additionally, it imposed terms of imprisonment for the storehouse breaking and grand larceny offenses.

On appeal, Tichnell claims that the court committed numerous prejudicial errors in the course of the pretrial and trial proceedings. He contends that the evidence was legally insufficient to permit the jury to convict him of wilful, deliberate and premeditated murder. He also attacks the constitutionality of Maryland's capital sentencing statute, as well as the imposition of the death sentence in the circumstances of the case.

I.

At the trial, the State adduced evidence that on January 18, 1979, at approximately 5:25 a.m. an alarm sounded in the Garrett County Central Alarm office, indicating that a break-in had occurred at Davidson's store located on the outskirts of Oakland. Deputy Livengood was immediately notified and drove to the store, accompanied by Sarge, his 108-pound German Shepherd K-9 dog. Officer Roger Lewis of the Oakland Police Department was also alerted, and he too drove to the scene.

The evidence showed that Davidson's store is located between Routes 219 and 4, being approximately equidistant to each road. The two routes parallel each other in a north-south direction. The front of the store is on the Route 219 side. Route 4 is a two-lane road; it is approximately 252 feet from the rear of the store. There is no automobile entrance to the store from Route 4.

Officer Lewis arrived in the front of the store at approximately 5:27 a.m. It was quite windy and light snow was falling; ice and snow covered the ground. Lewis noted

that the front door of the store had been broken open, and a minute or so later he entered the store. Sometime between 5:28 a.m. and 5:31 a.m. Deputy Livengood contacted Officer Lewis by police radio, advising him that he was proceeding to investigate a "suspect vehicle." He told Lewis to remain in his car in front of the store.

Between 5:30 and 5:35 a.m., James Wolfe, whose house overlooks Route 4 immediately behind Davidson's store, was leaving for work when he heard some yelling on the road. From a distance of approximately 460 feet, he observed a car, facing north, stopped on Route 4 with its headlights on, and a dog pacing back and forth in front of the headlights. After about ten seconds the dog disappeared, and fifteen seconds later Wolfe heard a burst of shots, followed by a split second pause, the sound of tires spinning and a simultaneous second burst of shots. Wolfe then saw a faint vision of a second car, without headlights, move in a southerly direction on Route 4 about twenty to thirty feet, after which he heard a "thump." Wolfe went into his house and called the sheriff's office; the time was then about 5:37 a.m. A few minutes later, Wolfe noticed the vehicle with the headlights leave the area. At 5:50 a.m., Wolfe drove on Route 4 behind Davidson's store and observed Deputy Livengood lying facedown at the edge of the northbound lane of the road. Wolfe promptly notified the sheriff's office and Officer Lewis and others immediately responded to the scene.[3]

Deputy Livengood had been shot seven times and was dead. His .38 caliber service revolver with three live and three spent cartridges was located beneath his body. A pair of handcuffs was found in the road about twenty-three feet from the deputy's body. Livengood's police cruiser was missing. His K-9 dog, Sarge, had been stabbed in the left shoulder region and his tongue had been deeply cut. The dog was lying off the road about twenty-six feet from the deputy's body when the investigating officers arrived at the scene; the dog died shortly thereafter. A 1965 Plymouth,

3. In accordance with Livengood's instructions, Lewis had remained in his police car in front of the store. He did not hear the shooting.

later identified as belonging to Tichnell, was observed partially off Route 4 in a snow-filled ditch, lodged against a wire fence and post; the vehicle was facing south, approximately forty feet from the deputy's body. The right passenger window was open. Two bullet holes were observed in Tichnell's car. One shot had struck the left front door of the vehicle near the door lock; the other hit the left front area of the doorpost. A 9 millimeter Browning semiautomatic revolver, later identified as the homicide weapon, and owned by Tichnell, was found on the front seat of his car. The gun contained seven empty shells and seven loaded cartridges; two of the spent cartridges were found on the floor of Tichnell's car behind the driver's seat; the other five casings were scattered about Route 4 in a cluster near the deputy's body. A fully loaded Smith and Wesson .38 revolver that had been stolen from Davidson's store three days earlier was also recovered from a field near the store close to Route 4.

At approximately 5:45 a.m. on the morning of the shooting, at a point about six miles from Oakland, Jerry Wilson saw a speeding car run a stop sign, hit a guard rail and go over an embankment. Two men ran from the vehicle, which was later identified as Deputy Livengood's police cruiser. At about 6 a.m., two armed men gained entry into the residence of Clifford Friend, which was located about 500 yards from the wrecked police cruiser. According to the testimony of Friend's twenty-year-old son, Carl, one of the men, who had a shoulder wound and was wearing a ski mask, said that he had "just shot and killed a fellow." Carl testified that the men demanded the keys to his car, tied up the four members of the family, ripped out the telephone wires, took $20 from him, a camera and a hat, and departed driving his 1978 Camaro. The Friends reported the incident to the police, including the make and license number of Carl's car.

At approximately 9:30 a.m. that morning, West Virginia State Police Troopers observed Tichnell and Recek driving Carl Friend's car, and they arrested the two men. Among

other items removed from the car were a bag containing the handguns stolen from Davidson's and a samurai sword with dog blood and dog hair on it. The bag also contained a shoulder holster capable of accommodating a 9 millimeter Browning semiautomatic; it was stained with blood of a type matching Tichnell's. The troopers observed that Tichnell had a gun shot wound in his right shoulder, a one and one-half inch laceration over his right eye, and a crushed tooth.

On the day of his arrest, after he had been treated for his wounds, Tichnell gave the police two statements, both of which were admitted into evidence without objection as to their voluntariness. In the statements, Tichnell said that on the night of January 17, 1979, he and Recek, a casual acquaintance, had been drinking together in Fairmont, West Virginia. Tichnell said he was a little intoxicated because between the hours of 11 p.m. on January 17 and 3:30 a.m. on January 18, he had consumed six to eight beers at one place, four to five Black Russians at a second place, and used 1/6 of an ounce of marijuana. Tichnell told Recek that he had broken into Davidson's store on January 15, 1979 and had taken a .38 Smith and Wesson gun. The two men decided to return to Davidson's that night to steal more guns, and they drove to Oakland in Tichnell's car. Tichnell parked the car in a driveway beside a barn located behind Davidson's. They broke the lock on the front door of the store, entered and broke into a handgun showcase at the rear of the store, removing some handguns. After being in the store for about three to five minutes, Tichnell said that they left through the front door and walked back to the car. Recek then discovered that he had lost the loaded gun which he had been carrying. Because it was the same weapon that Tichnell had stolen from Davidson's on January 15, and had given to Recek that night, Tichnell told Recek to go back and find it. Rather than risk detection, Tichnell said he drove about the Oakland area to give Recek time to find the lost gun. As he was returning to the store, driving on Route 219, he observed what he thought were two police cruisers in front of the store. He proceeded past the store on to Route 4, southbound,

in order to pick up Recek behind the store. As Tichnell approached the rear of the store on Route 4, he saw a police cruiser facing north, blocking his lane. At this precise moment, Tichnell said that his car headlights, which had been defective for some time, went out. He observed that an officer, gun in hand, had apprehended Recek and had him lying on the ground. Tichnell said he stopped his car about fifteen to twenty feet from the police car and got out to repair his headlights. At this time, the officer pointed his weapon at him and told him to lie down on the road. Tichnell complied and he heard the deputy order his K-9 dog to watch him. The dog stood over Tichnell and as he looked up the dog bit him on the side of his eye and through the inside of his mouth. Tichnell said that he screamed out with pain, became hysterical, and started running around in a circle to avoid the dog. Believing that the dog had torn his eye out, Tichnell ran to his car to get a medical aid kit which he kept in the back seat. At this point Tichnell heard the deputy order the dog to watch Recek; the deputy then followed Tichnell to his car, spun him around and placed a gun in his face. At this time, the door on the driver's side of Tichnell's two-door vehicle was open. Tichnell said he moved the deputy's weapon from his face and requested that the officer permit him to tend to his wounded eye. Tichnell stated that the deputy then put his gun against his (Tichnell's) shoulder and shot him from a distance of about a foot and a half. Tichnell said that the shot knocked him into his car and that he grabbed the barrel of the deputy's gun as he fell. Tichnell said that the deputy then tried to bring his gun down for another shot. While still holding the deputy's gun, Tichnell said he reached for his own gun which he kept under the front seat of his car. As the scuffle continued, the deputy fired again, the bullet narrowly missing the top of Tichnell's head. Tichnell stated that because he thought the deputy was going to shoot him again, he fired four or five shots at the deputy at point-blank range. He said that the first shot struck the deputy in the head, and he was certain that he was dead.

Tichnell acknowledged in his statements that he and

Recek attempted to leave the scene in Tichnell's car. After moving about thirty or forty feet, Tichnell said that the car slid on the ice and went off the road into a ditch. Realizing that his car was stuck, Tichnell decided to take the deputy's cruiser, but found the dog sitting in the front seat. As Recek attempted to get in the open door of the car, the dog lunged at him. Tichnell thereupon removed his samurai sword from his car and stabbed the dog behind its left shoulder; when he withdrew the sword, the dog rolled out of the car. Tichnell said that he and Recek then fled in the deputy's cruiser but subsequently wrecked it. Thereafter, he and Recek gained entrance to a nearby house, tied up the four members of the family and took their car. Before departing, Tichnell acknowledged telling one member of the family that he had gotten into a "skirmish" with a police officer and had to kill him. Tichnell said he was wearing a ski mask when he first entered the Friend home for the purpose of covering his bleeding face. He said he thereafter took the mask off and showed his face to the Friend family.

Other evidence adduced by the State showed that of the seven shots fired into the deputy's body, two were fatal, one in the lower back and the other in the back of the head. No powder burns were found on the clothing or upon the wounds of either Tichnell or the deputy. Expert testimony revealed that had the shots been fired at a range less than three feet, as Tichnell claimed, burned powder residue would have been found on the clothing or wounds of both the deputy and Tichnell. The expert witnesses concluded that the shots were fired at a distance greater than three feet.

There was evidence that Tichnell's blood type was found on broken glass fragments from the windshield of the deputy's car, suggesting that the laceration over Tichnell's eye may have been received at the time the car was wrecked near the Friend home. Except for Tichnell's statements, there was no evidence that the laceration was caused by a dog bite.

Testimony was received from First Sergeant John Dobb, who was in charge of training K-9 dogs for the Maryland State Police. He explained that a K-9 dog is trained to break

any prior command and to attack any person who is attacking his handler. Sgt. Dobb, who trained Sarge, said that the dog was outstanding in attack and handler protection work. This evidence was produced to refute Tichnell's statement that Sarge continued to watch Recek throughout the entire encounter with Deputy Livengood.

Evidence was also adduced by the State showing that Tichnell's shoulder holster, which was recovered from Carl Friend's car at the time of Tichnell's arrest, was stained with blood. From this evidence, the prosecution sought to establish that Tichnell was wearing the holster at the time he was shot in the shoulder and was carrying the murder weapon in it when he broke into the store with his armed confederate Recek.

The prosecution introduced evidence intended to refute Tichnell's claim that he drove about Oakland while he was waiting for Recek to find the lost gun. This evidence tended to show that, in view of the time involved between the break-in at the store, and the shooting of the deputy, Tichnell could not have traversed the route around Oakland which he said he had taken.

Also introduced into evidence was Tichnell's medical aid kit. Unlike the stolen guns, and the samurai sword, the kit had been left behind in Tichnell's car when he and Recek fled from the crime scene in the deputy's police cruiser.

Tichnell testified in his own behalf. He said that he was thirty-two years of age, a high school graduate, married with one child, had no criminal record, and collected weapons as a hobby. He had been a paramedic in the Army for several years and had worked at a steel mill as a laborer. He had been unemployed for over two years immediately prior to the shooting. In his testimony, Tichnell said that when the deputy first accosted him on Route 4, he was made to lie down in the street at a point approximately six to ten feet in front of his vehicle. In this position, Tichnell said he was between his car and Livengood's cruiser, and that the two vehicles were about twenty feet apart. Recek was lying about three feet from the deputy's cruiser and the dog was pacing back and forth.

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Tichnell described his actions after the dog bit him:

"I just jumped to my feet, running in a tight circle to keep away from the dog, plus I was blind in both eyes. I couldn't see for approximately three or four minutes, until the vision started coming back in my left eye and I could see my car and the headlights.

"At that time I made a run for my open car door to obtain the medical aid bag in the back of the car so I could apply a wet bandage to my eye in case it was out, to see if there could be anything preserved.

"At that time I was leaning into the back seat, I heard the officer putting the dog — told him to watch Oscar — and I heard him running towards me. This was about the same time that I was running. At this time I was screaming hysterically.

"I opened the back seat to reach in. That is when he reached across the window and spun me around. And when he spun me around he placed his weapon in my face, and I moved it — excuse me — I moved the weapon out of my line of vision and asked him not to put it in my face. I put my hands back in the air.

"At that time he fired a round into my right shoulder, spinning me back towards the car. At this time I grabbed the barrel of his weapon as I was falling and stuck out my left arm to break my fall, to prevent him from shooting me again. At this time I glanced off the seat with my hand and fell directly upon my Browning high power.

"Struggling to get out of the car he fired another round at me with both hands on the weapon. At this time I shoved his weapon upward and ducked and the bullet tore through my hair. At that time I just pulled the hammer back, and he was coming back down with his weapon and I was coming up with mine, and I exchanged several shots."

Tichnell's testimony was consistent with the statements he had given to the police at the time of his arrest. Recek, who was also under indictment for murder, did not testify.

Judge Pollitt instructed the jury, in accordance with Tichnell's defense, as follows:

> "If you believe from the evidence that on the date in question near this Discount Store in Oakland the defendant, Richard Tichnell, was apprehended by Deputy Sheriff Livengood for breaking and entering the store and had surrendered, and that thereafter while being guarded by the dog he was bitten on the face and ran to his car to obtain medical treatment, and was not attempting to evade or resist arrest and was not attempting to harm Deputy Sheriff Livengood, and that at that time Officer Livengood started shooting at the defendant, then in such circumstances the defendant may use whatever force is necessary to repel the attack, and in so doing would be exercising the right of self defense and would not be guilty of felonious homicide in such circumstances.
>
> "In other words, if at the time of the shooting the defendant had peacefully submitted to arrest and was thereafter shot by the arresting officer while attempting to get medical attention, then the defendant would have a right of self defense and could use such force as was reasonably necessary to prevent death or serious bodily harm to himself.
>
> "In order to apply the doctrine of self defense you must find that the felony of storehouse breaking was over and completed and that the defendant had submitted to arrest, because the defense of self defense is not available in cases of felony murder. In cases of felony murder the defendant is the aggressor engaged in the commission of a felony.
>
> "A person may use a reasonable amount of force in self defense, including in some circumstances deadly force. If the defendant actually believed that he was in imminent danger of death or serious bodily harm from which he could save himself only by using deadly force against his assailant, and had

> reasonable grounds to so believe, then he had a right to employ deadly force in order to defend himself."

In view of the evidence presented, the State maintained that the shooting did not occur as Tichnell had related it, but rather that Tichnell murdered the deputy in cold blood as he was interrupted in his departure from the scene of the storehouse breaking; consequently, the prosecution urged that Tichnell was guilty of felony murder committed in the course of the storehouse breaking and of wilful, deliberate and premeditated murder.[4]

The jury rejected Tichnell's version of the shooting and found him guilty of wilful, deliberate and premeditated first degree murder under detailed instructions from Judge Pollitt, to which no exceptions were taken.

(A)

Tichnell contends that Judge Pollitt committed reversible error in consolidating the three indictments for trial over his objection. He relies upon *McKnight v. State*, 280 Md. 604, 375 A.2d 551 (1977), where we delineated the three types of prejudice to an accused that may result from an improper joinder of indictments, viz.:

> "First, [the accused] may become embarrassed, or confounded in presenting separate defenses. ... Secondly, the jury may cumulate the evidence of the various crimes charged and find guilt when, if the offenses were considered separately, it would not do so. At the very least, the joinder of multiple charges may produce a latent hostility, which by itself may cause prejudice to the defendant's case. Thirdly, the jury may use the evidence of one of the crimes charged, or a connected group of them, to infer a criminal disposition on the part of the defendant

4. The State abandoned the robbery count before the jury retired to consider its verdicts.

> from which he may also be found guilty of other crimes charged."
>
> 280 Md. at 609 (citations omitted).

Tichnell argues that he was prejudiced by the joinder of the three indictments for reasons identical to those set forth in *McKnight* and reiterated in *State v. Jones*, 284 Md. 232, 395 A.2d 1182 (1979).

Maryland Rule 745 a provides that the court may order two or more charging documents to be tried together "if the offenses . . . could have been joined in a single charging document." Rule 712 a provides that two or more offenses may be charged in the same charging document "if the offenses charged are of the same or similar character or are based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan." Rule 745 c provides:

> "If it appears that any party will be prejudiced by the joinder for trial of counts, charging documents or defendants, the court may, upon its own motion or the motion of any party, order separate trials of counts, charging documents or defendants, or grant any other relief justice requires."

Interpreting these rules, *McKnight* and *Jones* held that a defendant charged with similar but unrelated offenses is entitled to a severance where he establishes that the evidence as to each offense would not be mutually admissible at separate trials.

In seeking joinder of the indictments for trial, the prosecution proffered that unlike *McKnight* the crimes charged were related, occurred within ten or fifteen minutes of each other, and constituted one continuous and uninterrupted criminal transaction. In ordering the consolidation under Rule 745 a, Judge Pollitt agreed with the State's position, noting in addition that to prove the commission of a felony murder, the prosecution would have to establish the underlying felony of either storehouse breaking or robbery, both crimes being charged in the other indictments joined for trial.

We think the joinder was proper in this case under Rule 745 a because all the offenses charged were related and were "based on the same act or transaction or on two or more acts or transactions connected together . . . ." Rule 712 a. As the State maintains, the offenses were so intertwined that one could not be proved without producing evidence of the other.

McKnight involved four independent and distinct robberies, committed in the same neighborhood, over a one-month period. That case recognizes that where offenses, even of a similar character, are joined for trial, under circumstances where the evidence as to each offense would not be mutually admissible at separate trials, the prejudicial effect of such evidence is apt to outweigh its probative value. Where, however, the evidence of other crimes would be mutually admissible, joinder is within the trial court's sound discretion.

It is, of course, well settled that evidence of other offenses independent of the particular crime charged is inadmissible, unless the evidence is substantially relevant for some other purpose than to show that the accused committed the crime on trial because of his criminal character. *Cross v. State*, 282 Md. 468, 473, 386 A.2d 757 (1978); *McKnight, supra*, 280 Md. at 612; *Ross v. State*, 276 Md. 664, 669, 305 A.2d 680 (1976). The primary policy consideration underlying this rule is that this type of evidence will prejudice the jury against the accused because of the jury's tendency to infer that the accused is a "bad man" who should be punished regardless of his guilt of the charged crime, or to infer that he committed the charged crime due to a criminal disposition. 1 J. Wigmore, *Evidence* § 57, at 454-56 (3d ed. 1940).

Some of the well-established categories of evidence outside the ambit of the narrow rule of exclusion include evidence of other crimes which tends to establish (1) motive, (2) intent, (3) absence of mistake, (4) a common scheme or plan embracing the commission of two or more crimes so related to each other that proof of one tends to establish the other, and (5) the identity of the person charged with the

commission of a crime on trial. Other exceptions have been recognized as well. *See, e.g., State v. Jones, supra*, 284 Md. at 238; *Cross v. State, supra*, 282 Md. at 473-74; *McKnight, supra*, 280 Md. at 612; *Ross, supra*, 276 Md. at 669-70. One such exception permits the admission of evidence of other crimes when the several offenses are so connected or blended in point of time or circumstances that they form one transaction, and cannot be fully shown or explained without proving the others. *See, e.g., Cross, supra*, 282 Md. at 474; *Bryant v. State*, 207 Md. 565, 115 A.2d 502 (1955); *Wood v. State*, 191 Md. 658, 62 A.2d 576 (1948); *Berger v. State*, 179 Md. 410, 20 A.2d 146 (1941); *Mitchell v. State*, 178 Md. 579, 16 A.2d 161 (1940); *McCormick on Evidence* § 190 (2d ed. 1972); 1 J. Wigmore, *Evidence* § 218 (3d ed. 1940).

State v. Jones, supra, upon which Tichnell relies, does not require a severance of the offenses. In that case, the defendant was convicted of first degree murder, armed robbery, two charges of attempted armed robbery, and two handgun violations. At issue was whether the trial court abused its discretion in denying the defendant's motion for a severance. The evidence showed that the defendant and several others decided to commit some robberies to obtain money to buy drugs. They drove around Baltimore City and robbed or attempted to rob persons at three different business establishments within the course of two and one-half hours. In producing evidence of the various offenses, the State relied on the "common scheme" exception to the general exclusionary rule. Under the facts of the case, however, we held, Judge Cole speaking for the Court, that the State failed to prove a single inseparable plan encompassing the offenses and did not establish

> "that the various acts constituting the offenses naturally relate to one another by time, location, circumstances and parties so as to give rise to the conclusion that they are several stages of a continuing transaction." 284 Md. at 243.

Because the offenses did not fall within the common scheme exception upon which the State relied, we held that the trial

court abused its discretion in failing to grant a severance. As we have indicated, the offenses consolidated for trial were closely related to each other and occurred within a fifteen-minute period within a tightly confined area near Davidson's store. Among other reasons, the proximity of time and space within which the offenses were committed distinguishes this case from *Jones*.

We conclude that the trial judge did not abuse his discretion in consolidating the three indictments for trial and that Tichnell was not prejudiced by the joinder for any of the reasons claimed under *McKnight*.[5]

(3)

Tichnell contends that he was obliged to ask for a change of venue from Garrett County, but that he was prejudiced by the removal to Wicomico County, some 300 miles to the east. He contends that he was thereby denied his constitutional right under Art. 20 of the Maryland Declaration of Rights to try the facts of the case where they arose.[6] He also contends that he was entitled to be tried by a jury of his peers under Art. 24 of the Declaration of Rights, but that a Wicomico County jury did not constitute a jury of his peers in a case arising from Garrett County, high in the Appalachian mountain region.[7] These contentions are devoid of merit.

Tichnell did not object to the removal of the case to Wicomico County, nor did he seek a further removal to another county.[8] Under these circumstances, the claims of

5. The "identity" and "common scheme" exceptions to the other crimes rule are not applicable in the circumstances of this case. Because Tichnell admitted his identity at the outset of the trial, the identity exception was inapplicable. P. Herrick, 1 *Underhill's Criminal Evidence* § 210 at 637 (6th ed. 1973). The common scheme exception was inapplicable because the crimes charged in the three indictments did not encompass a "single inseparable plan." State v. Jones, *supra*, 284 Md. at 241-42.

6. Art. 20 provides: "That the trial of facts where they arise, is one of the greatest securities of the lives, liberties and estate of the People."

7. Art. 24 provides that "no man ought to be ... deprived of his life, liberty or property, but by the judgment of his peers, or by the Law of the land."

8. Art. 4, Sec. 8 of the Maryland Constitution makes provision for an automatic right of removal in a capital criminal case "to some other court having jurisdiction in such case for trial ...."

prejudicial removal and violation of Art. 20 are not properly before us. Maryland Rule 885. The right under Art. 24 to a judgment by one's peers guarantees trial by jury. *See Wright v. Wright's Lessee*, 2 Md. 429, 452 (1852). Although Art. 21 further guarantees the right to an impartial jury, *Couser v. State*, 282 Md. 125, 383 A.2d 389 (1978), an accused, of course, does not have the right to be tried by any particular jury or jurors. *See, e.g., Kinsey v. State*, 49 Ariz. 201, 65 P.2d 1141, 1148 (1937); *Nail v. State*, 231 Ark. 70, 328 S.W.2d 836, 841-42 (1959); *People v. Howard*, 211 Cal. 322, 295 P. 333, 334 (1930); *State v. Critelli*, 237 Iowa 1271, 24 N.W.2d 113, 118 (1946).

Tichnell next contends that he was denied a fair and impartial jury trial because a hostile atmosphere was generated (a) by a parade of police officers, and other persons associated with police programs, all of whom testified for the State at the trial, (b) by a number of "erratic statements" made by the prosecutor to the jury based on speculation rather than evidence, and upon other prosecutorial misconduct, (c) by the trial judge overruling defense objections and motions on evidentiary issues, thus damaging his record, (d) by displaying inflammatory exhibits to the jury, and also boxes containing exhibits which were marked in large black letters as relating to the "murder" of the deputy, and (e) by undue reference to Tichnell as a West Virginian.

We have carefully reviewed the record and conclude that these contentions, which represent bald allegations at best, unsupported by specifics, are without merit.

Tichnell also contends that Judge Pollitt did not give adequate instructions to the jury and in particular failed clearly to instruct the jury that the burden was on the State to prove beyond a reasonable doubt that he did not act in self-defense when he shot the deputy. Since Tichnell did not object to the detailed instructions given by Judge Pollitt, review as of right is precluded. Maryland Rule 757. Moreover we see no plain error in the court's jury instructions, including its instructions pertaining to the

State's burden of proof on Tichnell's claim of self-defense. *See State v. Evans*, 278 Md. 197, 362 A.2d 629 (1976).[9]

(C)

Tichnell contends that the trial court improperly admitted evidence pertaining to crimes committed at the Friend residence. He points out that he was not on trial for any of these offenses, and claims that he was prejudiced by the admission of this evidence, *i.e.*, the testimony of Carl Friend that Recek and a man wearing a ski mask had entered the Friend residence brandishing guns, tied up the members of the family, stole Carl's car, $20 in cash, a camera and a hat.

Tichnell objected to Friend's testimony on relevancy grounds. He advised the court before Friend testified that his identity as one of the persons who entered the Friend home would be admitted. He claimed that "proving other crimes which are not charged in the indictment ... will certainly taint this jury should they be called upon to pass upon the death sentence." Judge Pollitt ruled that evidence of flight was relevant and had a bearing on the consciousness of guilt and was admissible even if "in the process it happens to show the commission of some other crimes."

The State argues that under *Cross v. State*, *supra*, it is permissible to introduce evidence of crimes other than those on trial to establish motive, intent, identity or a common plan. It contends that Tichnell's conduct, appearance and conversation, at a time shortly after the killing, were directly relevant to his state of mind. According to the State, the continuation of flight, the attempt at disguise, and the statements made by Tichnell at the Friend house prove the intent and motive accompanying the earlier crimes.

We think that Tichnell waived his objection to the admission of the contested evidence. While he objected to Friend's testimony before it was given, and moved

9. The jury was instructed: "The State has the burden of proving based upon the evidence introduced at trial every fact necessary to convict the defendant of the crimes with which he is charged. This burden remains with the State throughout the trial. The defendant does not have the burden of proving his innocence or producing any evidence."

unsuccessfully for a mistrial after it was given, he did not thereafter object to the admission of his first statement to the police, which recounted the crimes committed at the Friend home. Nor did he object to the admission of his second statement, which also contained details concerning the commission of these offenses. Under Maryland Rule 522 d 2, it is not reversible error when evidence, claimed to be inadmissible, is later admitted without objection. *See, e.g., Robeson v. State*, 285 Md. 498, 403 A.2d 1221 (1979), *cert. denied*, 444 U.S. 1021; *S & S Bldg. Corp. v. Fidelity Storage*, 270 Md. 184, 310 A.2d 778 (1973); *Peisner v. State*, 236 Md. 137, 144, 202 A.2d 585 (1964), *cert. denied*, 379 U.S. 1001, 85 S. Ct. 724, 13 L. Ed. 2d 702 (1965); *Hyson v. State*, 225 Md. 140, 169 A.2d 449 (1961) (per curiam); *Journigan v. State*, 223 Md. 405, 412, 164 A.2d 896 (1960); *State Roads Comm. v. Bare*, 220 Md. 91, 94, 151 A.2d 154 (1959).[10] On direct examination, Tichnell testified to the events at the Friend house and to his seizure of Carl Friend's vehicle. His testimony was consistent with his earlier statements to the police, which were admitted in evidence without objection. Tichnell's own testimony having confirmed the evidence to which he had previously objected, no reversible error exists. *See Hillard v. State*, 286 Md. 145, 406 A.2d 415 (1979); *Robeson v. State, supra*, 285 Md. at 506-07; *Peisner v. State, supra*, 236 Md. at 144-45; *Connor v. State*, 225 Md. 543, 555, 171 A.2d 699, *cert. denied*, 368 U.S. 906, 82 S. Ct. 186, 7 L. Ed. 2d 100 (1961). Thus, even assuming the evidence of other crimes committed at the Friend residence was inadmissible, Tichnell nevertheless wavied his objection to such evidence.[11]

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10. It is of no assistance to Tichnell that he belatedly objected to the admission of the part of the second statement which covered the Friend incident. Nor does it help his argument that he moved for a mistrial at the close of the State's case-in-chief on the ground that evidence of the Friend offense was inadmissible.

11. While we do not decide the question, we note the existence of cases holding that evidence of flight, even though it may show the commission of other crimes by the defendant, is admissible to show intent or consciousness of guilt. *See, e.g.*, Westcoat v. State, 231 Md. 364, 190 A.2d 544 (1963); Clay v. State, 211 Md. 577, 585, 128 A.2d 634 (1957); United States v. Peltier, 585 F.2d 314, 322-25 (8th Cir. 1978), *cert. denied*, 440 U.S. 945, 99 S. Ct. 1422, 59 L. Ed. 2d 634 (1979); Meredith v. State, 247 Ind. 233, 214

(D)

Tichnell contends that in view of the evidence at the trial, including the evidence that the shooting of the deputy was in self-defense, the jury could not rationally find, beyond a reasonable doubt, that he was guilty of wilful, deliberate and premeditated first degree murder. We disagree.

In *Jackson v. Virginia*, 443 U.S. 307, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979), the Supreme Court held that the due process standard recognized in In re Winship, 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970), requires that the following standard be applied in a review of the sufficiency of the evidence to support a criminal conviction: "whether the record evidence could reasonably support a finding of guilt beyond a reasonable doubt." 443 U.S. at 318. This standard does not require a court to "'ask itself whether *it* believes that the evidence at the trial established guilt beyond a reasonable doubt.'" *Id.* at 318-19 (emphasis in original). Instead, the standard to apply is "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Id.* at 319 (emphasis in original).

The principles of law applicable to determining whether a felonious homicide constitutes a wilful, deliberate and premeditated murder are well settled. For a killing to be "wilful" there must be a specific purpose and intent to kill; to be "deliberate" there must be a full and conscious knowledge of the purpose to kill; and to be "premeditated" the design to kill must have preceded the killing by an appreciable length of time, that is, time enough to be deliberate. It is unnecessary that the deliberation or premeditation shall have existed for any particular length of

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N.E.2d 385, 386-87 (1966); State v. Davies, 350 So. 2d 586, 588-89 (La. 1977); Commonwealth v. Gilday, 367 Mass. 474, 327 N.E.2d 851, 864 (1975); Williams v. State, 85 Nev. 169, 451 P.2d 848, 852 (1969); State v. Jones, 292 N.C. 513, 234 S.E.2d 555, 561-62 (1977); State v. Ross, 92 Ohio App. 29, 108 N.E.2d 77, 83-84 (1952); Whittington v. State, 580 S.W.2d 845 (Tex. Cr. App. 1979); Thames v. State, 453 S.W.2d 495, 500-01 (Tex. Cr. App. 1970); *Underhill's Criminal Evidence*, *supra*, § 206 at 604.

time. Their existence is discerned from the facts of the case. *E.g., Gladden v. State*, 273 Md. 383, 397, 330 A.2d 176 (1974); *Robinson v. State*, 249 Md. 200, 208-09, 238 A.2d 875, *cert. denied*, 393 U.S. 928, 89 S. Ct. 259, 21 L. Ed. 2d 265; *Chisely v. State*, 202 Md. 87, 106-07, 95 A.2d 577 (1953). If the killing results from a choice made as the result of thought, however short the struggle between the intention and the act, it is sufficient to characterize the crime as deliberate and premeditated murder. *Wilson v. State*, 261 Md. 551, 565, 276 A.2d 214 (1971); *Hyde v. State*, 228 Md. 209, 215-216, 179 A.2d 421 (1962). Of course, an inference of a specific intent to kill may arise from the use of a deadly weapon against a vital part of the body. *See, e.g., State v. Evans, supra*, 278 Md. at 205; *Davis v. State*, 204 Md. 44, 51, 102 A.2d 816 (1954).

To justify a homicide on the basis of self-defense (other than felony murder)

> "the accused must have had reasonable grounds to believe, and have in fact believed, himself in apparent imminent or immediate danger of death or serious bodily harm from his assailant or potential assailant. . . . In Maryland it is for the trier of the facts to determine whether the accused was justified in meeting force with force. If justification be found to have existed, the force used must not have been 'unreasonable and excessive', that is, must not have been more force 'than the exigency reasonably demanded.' "
>
> *Guerriero v. State*, 213 Md. 545, 549, 132 A.2d 466 (1957) (citations omitted).

Accord, DeVaughn v. State, 232 Md. 447, 453, 194 A.2d 109 (1963), *cert. denied*, 376 U.S. 927, 84 S. Ct. 693, 11 L. Ed. 2d 623; *Bruce v. State*, 218 Md. 87, 96-97, 145 A.2d 428 (1958). As the record reveals that Tichnell introduced evidence sufficient to generate a jury issue with respect to self-defense, the State had the burden of negating the defense. *State v. Evans, supra*, 278 Md. at 207-08.

A. 21

The jury was not obliged to believe Tichnell's version of the shooting and it did not. From the evidence in the case, the jury could rationally find, beyond a reasonable doubt, that Deputy Livengood was not shot while he struggled with Tichnell at the door of Tichnell's car. Wolfe's testimony showed that there was a burst of gunfire, followed almost immediately by the sound of spinning wheels and a simultaneous volley of additional shots — a version wholly inconsistent with Tichnell's statements and testimony. The absence of gunshot powder burns on either the deputy's or Tichnell's clothing also contradicted Tichnell's statements that the shots were fired at point-blank range. The five spent shells found in close proximity to the deputy's body constituted evidence that he was shot at some distance from Tichnell's car. The jury could find from the evidence that Tichnell was lying when he said he drove around Oakland while waiting for Recek to find the lost gun. It could have found that Tichnell was lying about being bitten by the K-9 dog, about the dog's inaction during the alleged struggle at the car, and about the stabbing of the dog inside of the deputy's cruiser. It could have found from the wounds suffered by the deputy that the fatal shots were fired into his body from behind when he was investigating the suspect vehicle observed at the scene.

The jury could have found from the evidence of the bloody holster that Tichnell was lying when he said he was unarmed when he broke into Davidson's store and when he first confronted the deputy on or near Route 4. And the jury could have found from the course of Tichnell's flight, and his actions during that time, that he was conscious of his guilt — a circumstance at variance with his later statements that the killing was in justifiable self-defense. In sum, the evidence supplied to the jury provided an ample basis to find wilful, deliberate and premeditated first degree murder under the test articulated in *Jackson v. Virginia, supra*. In so concluding, we are not unmindful of the principle that the firing of two or more shots separated by an interval of time may be viewed as evidence of premeditation. *See Wilson v. State, supra; Cummings v. State*, 223 Md. 606, 165 A.2d 886

(1960); *Chisley v. State*, 202 Md. 87, 95 A.2d 577 (1953); *Fuller v. State*, 45 Md. App. 414, 413 A.2d 277 (1980).

II

(A)

Tichnell next contends that Maryland's death penalty statute, ch. 3 of the Acts of 1978, now codified as Maryland Code (1957, 1976 Repl. Vol., 1979 Cum. Supp.), Art. 27, §§ 412-414, is facially unconstitutional since it imposes cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments to the federal constitution and Art. 25 of the Maryland Declaration of Rights.[12]

By ch. 115 of the Acts of 1908, the General Assembly invested trial courts of general jurisdiction with the discretion to sentence a person convicted of first degree murder to either death or life imprisonment. In *Furman v. Georgia*, 408 U.S. 238, 92 S. Ct. 2726, 33 L. Ed. 2d 346 (1972), the Supreme Court declared in a per curiam opinion that death sentences administered under such discretionary statutes constituted cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments to the federal constitution. Five Justices supported the Court's per curiam decision; four Justices dissented. Justices Brennan and Marshall found the imposition of the death penalty unconstitutional as constituting cruel and unusual punishment in all cases. Justice Douglas concluded that sentencing procedures, which vested judges or juries with uncontrolled discretion in deciding whether to impose either capital punishment or imprisonment, led to arbitrary and discretionary application of the penalty to unpopular groups, thus violating the concept of equal protection implicit in the

12. The Eighth Amendment provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

Art. 25 provides: "That excessive bail ought not to be required, nor excessive fines imposed, nor cruel or unusual punishment inflicted, by the Courts of Law."

A. 26

ban on cruel and unusual punishments. Justice Stewart also focused on the administration of the penalty and concluded, in part, that the death sentences before the Court were cruel and unusual because they were wantonly and freakishly imposed upon a capriciously selected few. Focusing on the infrequent imposition of the penalty and the lack of a meaningful basis for distinguishing the cases in which death is imposed from the cases in which it is not, Justice White found such a discretionary imposition of the death penalty to constitute cruel and unusual punishment. A central theme of the four dissenting Justices (Burger, Blackmun, Powell and Rehnquist) was the appropriateness of judicial deference to society's will as manifested in the legislative enactment of discretionary death penalty statutes.

Based on its decision in *Furman*, the Supreme Court vacated the death sentences in all of the pending cases on its docket, and remanded them for further proceedings. The response to *Furman* was varied. Some jurisdictions read *Furman* as requiring a mandatory death penalty, while others construed the decision merely to forbid unbridled discretion in capital sentencing statutes.

In *Bartholomey v. State*, 267 Md. 175, 182, 297 A.2d 696 (1972), we declared Maryland's then existing death penalty statutes unconstitutional. We said:

> "We entertain not the slightest doubt that the imposition of the death sentence under any of the presently existing discretionary statutes of Maryland which authorize, but do not require, that penalty is unconstitutional under *Furman* as violative of the Eighth and Fourteenth Amendments to the federal constitution. In other words, we think the net result of the holding in *Furman* is that the death penalty is unconstitutional when its imposition is not mandatory." 267 Md. at 184.

The General Assembly responded to *Furman* and *Bartholomey* by enacting a mandatory death penalty statute. Ch. 252, Acts of 1975, codified as Maryland Code

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(1957, 1976 Repl. Vol.), Art. 27, § 413. Under this legislation, the death penalty had to be automatically imposed upon conviction of a specifically defined and narrowly drawn class of first degree murders.

In *Woodson v. North Carolina*, 428 U.S. 280, 96 S. Ct. 2978, 49 L. Ed. 2d 944 (1976), and *Roberts v. Louisiana*, 428 U.S. 325, 96 S. Ct. 3001, 49 L. Ed. 2d 974 (1977), the Supreme Court held that mandatory death penalty statutes for first degree murder were unconstitutional because, as stated in *Woodson*, they lacked

> "the fundamental respect for humanity underlying the Eighth Amendment ... [which] requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death." 428 U.S. at 304 (citation omitted).

The Court identified other constitutional shortcomings of a mandatory death penalty statute. It said in *Woodson* that such mandatory measures violated contemporary standards of civilization, *id.* at 289-301, and impermissibly vested standardless sentencing discretion in juries, *id.* at 302-03.

In accordance with *Woodson* and *Roberts*, we held that Maryland's mandatory death penalty statute was unconstitutional. *Blackwell v. State*, 278 Md. 466, 365 A.2d 545 (1976), *cert. denied*, 431 U.S. 918, 97 S. Ct. 2183, 53 L. Ed. 2d 229 (1977). The statute, we said, was constitutionally defective because it did not provide sufficient

> "standards whereby the sentencing authority can consider the individual circumstances or characteristics of either the offense or the offender; indeed, all those convicted under the statute are treated alike, without regard to the circumstances." 278 Md. at 472.

In the aftermath of *Furman*, the Supreme Court not only considered the constitutionality of mandatory death penalty statutes, but also addressed the constitutionality of "guided discretion" statutes. It upheld the death penalty statutes of Georgia, *Gregg v. Georgia*, 428 U.S. 153, 96 S. Ct. 2909, 49 L. Ed. 2d 859 (1976); Florida, *Proffitt v. Florida*, 428 U.S. 242, 96 S. Ct. 2960, 49 L. Ed. 2d 913 (1976); and Texas, *Jurek v. Texas*, 428 U.S. 262, 96 S. Ct. 2950, 49 L. Ed. 2d 929 (1976). In *Gregg*, the Court rejected the argument that the death penalty constitutes cruel and unusual punishment under all circumstances. 428 U.S. at 168-87. The Court's plurality opinion approved the constitutionality of guided discretion capital sentencing statutes. It construed *Furman* as holding that the death penalty could not be imposed under sentencing procedures that created a substantial risk that it would be inflicted in an arbitrary and capricious manner. It further stated:

> "Furman mandates that where discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action." *Id.* at 188.

The death penalty statutes upheld by the Court in *Gregg*, *Proffitt* and *Jurek* each contained three provisions which guarded against the concerns raised in *Furman*. First, each of the new discretionary statutes provided for a bifurcated trial so that guilt and punishment would be separately determined. Second, imposition of the death penalty was restricted to cases in which certain aggravating circumstances were established. The sentencing authority was also required to consider the existence of mitigating circumstances. The Court stated in *Jurek v. Texas*, *supra*, 428 U.S. at 274, that this type of provision

> "guides and focuses the [sentencing authority's] objective consideration of the particularized circumstances of the individual offense and the individual offender before it can impose a sentence of death."

Finally, the statutes that were upheld provided for expedited appellate review of the death penalty statute as a check against the random or arbitrary imposition of the death penalty.

Maryland's current capital sentencing statute, Art. 27, §§ 412-414, enacted following our decision in *Blackwell v. State*, *supra*, retains the death penalty for first degree murder.[13] The guilt or innocence of an accused charged with first degree murder, who is properly notified of the State's intent to seek the death penalty, is determined in the traditional manner either by the court or a jury as the first step of a bifurcated trial. As soon as practicable after the defendant is found guilty of first degree murder, a separate sentencing proceeding must be held to determine whether death or life imprisonment should be imposed. § 413 (a). Section 413 (b) provides that this proceeding shall be heard:

> "(1) Before the jury that determined the defendant's guilt; or
>
> (2) Before a jury impaneled for the purpose of the proceeding if:
>
> (i) The defendant was convicted upon a plea of guilty;
>
> (ii) The defendant was convicted after a trial before the court sitting without a jury;
>
> (iii) The jury that determined the defendant's guilt has been discharged by the court for good cause; or
>
> (iv) Review of the original sentence of death by a court of competent jurisdiction has resulted in a remand for resentencing; or
>
> (3) Before the court alone, if a jury sentencing proceeding is waived by the defendant."

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13. Section 412 (b) provides that
"[a] person found guilty of murder in the first degree shall be sentenced either to death or to imprisonment for life. The sentence shall be imprisonment for life unless (1) the State notified the person in writing at least 30 days prior to trial that it intended to seek a sentence of death, and advised the person of each aggravating circumstance upon which it intended to rely, and (2) a sentence of death is imposed in accordance with § 413."

Section 413 (c) specifies a wide range of evidence that may be introduced at this proceeding, including evidence relating to any statutorily specified aggravating or mitigating circumstance.[14] At the sentencing proceeding, argument may be presented for or against a death sentence. § 413 (c) (2).

In determining the appropriate sentence, the sentencing authority — either the judge or jury — must first consider whether, beyond a reasonable doubt, any of ten statutory aggravating circumstances exist. § 413 (d).[15] If the

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14. Section 413 (c) further permits the admission of:

"(iii) Evidence of any prior criminal convictions, pleas of guilty or nolo contendere, or the absence of such prior convictions or pleas, to the same extent admissible in other sentencing procedures;

(iv) Any presentence investigation report. However, any recommendation as to sentence contained in the report is not admissible; and

(v) Any other evidence that the court deems of probative value and relevant to sentence, provided the defendant is accorded a fair opportunity to rebut any statements."

15. Section 413 (d) specifies the following aggravating circumstances:

"(1) The victim was a law enforcement officer who was murdered while in the performance of his duties.

(2) The defendant committed the murder at a time when he was confined in any correctional institution.

(3) The defendant committed the murder in furtherance of an escape or an attempt to escape from or evade the lawful custody, arrest, or detention of or by an officer or guard of a correctional institution or by a law enforcement officer.

(4) The victim was a hostage taken or attempted to be taken in the course of a kidnapping or abduction or an attempt to kidnap or abduct.

(5) The victim was a child abducted in violation of § 2 of this article.

(6) The defendant committed the murder pursuant to an agreement or contract for remuneration or the promise of remuneration to commit the murder.

(7) The defendant engaged or employed another person to commit the murder and the murder was committed pursuant to an agreement or contract for remuneration or the promise of remuneration.

(8) At the time of the murder, the defendant was under sentence of death or imprisonment for life.

(9) The defendant committed more than one offense of murder in the first degree arising out of the same incident.

(10) The defendant committed the murder while committing or attempting to commit robbery, arson, or rape or sexual offense in the first degree."

sentencing authority does not find beyond a reasonable doubt the existence of one or more of the aggravating circumstances, then the sentence shall be life imprisonment. § 413 (f). If, however, the sentencing authority finds beyond a reasonable doubt the existence of one or more aggravating factors, then it must determine whether, by a preponderance of the evidence, any one of eight mitigating circumstances exist. § 413 (g).[16] The statute requires that a sentence of life imprisonment be imposed if, by a preponderance of the evidence, the sentencing authority finds that the mitigating circumstances outweigh the aggravating circumstances. § 413 (h) (1) and (3). If the mitigating circumstances do not outweigh the aggravating circumstances by a preponderance of the evidence, however, then a sentence of death must be imposed. § 413 (h) (1) and (2). The sentencing authority's decision must be in writing, and if the decision is made by a jury, it must be unanimous

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16. The following mitigating circumstances are specified in § 413 (g):

"(1) The defendant has not previously (i) been found guilty of a crime of violence; (ii) entered a plea of guilty or nolo contendere to a charge of a crime of violence; or (iii) had a judgment of probation on stay of entry of judgment entered on a charge of a crime of violence. As used in this paragraph, 'crime of violence' means abduction, arson, escape, kidnapping, manslaughter, except involuntary manslaughter, mayhem, murder, robbery, or rape or sexual offense in the first or second degree, or an attempt to commit any of these offenses, or the use of a handgun in the commission of a felony or another crime of violence.

(2) The victim was a participant in the defendant's conduct or consented to the act which caused the victim's death.

(3) The defendant acted under substantial duress, domination or provocation of another person, but not so substantial as to constitute a complete defense to the prosecution.

(4) The murder was committed while the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired as a result of mental incapacity, mental disorder, emotional disturbance, or intoxication.

(5) The youthful age of the defendant at the time of the crime.

(6) The act of the defendant was not the sole proximate cause of the victim's death.

(7) It is unlikely that the defendant will engage in further criminal activity that would constitute a continuing threat to society.

(8) Any other facts which the jury or the court specifically sets forth in writing that it finds as mitigating circumstances in the case."

and signed by the foreman. § 413 (i).[17] Under § 413 (k), the trial court is required to impose the sentence determined by the sentencing authority. If, however, the jury is unable to agree upon a sentence within a reasonable amount of time, the court must dismiss the jury and impose a sentence of life imprisonment. § 413 (k) (2).

Section 413 (l) further provides that the Court of Appeals may adopt rules of procedure to govern the conduct of the sentencing proceeding. Pursuant to this provision, we adopted Maryland Rule 772A, effective January 1, 1979 (eighteen days prior to the murder in this case). The rule imposes three major requirements, the first of which is the use of a standard form verdict sheet. As formulated in the rule, the sentencing authority must specify in writing whether each aggravating or mitigating circumstance was established by the degree of proof mandated by § 413. Rule 772A e further requires the trial court to advise the defendant of his right to appeal. Finally, subsection (f) of the rule obligates the trial court to prepare an extensive report in every case where the death penalty is sought, whether or not it is imposed. The report, which must be submitted to us under the rule, is designed to provide detailed information concerning the defendant, the offense, the victim, and the circumstances of the trial. In instances when a sentence of death is imposed, the trial judge must state his opinion whether the sentence was justified. The factual accuracy of the trial judge's report may be commented on by the parties within five days after receiving it.

Provision is made in the statute for expedited review by

17. Under § 413 (j), the determination by the sentencing authority must specify the following information:

"(1) Which, if any, aggravating circumstances it finds to exist;

(2) Which, if any, mitigating circumstances it finds to exist;

(3) Whether any mitigating circumstances found under subsection (g) outweigh the aggravating circumstances found under subsection (d);

(4) Whether the aggravating circumstances found under subsection (d) are not outweighed by mitigating circumstances under subsection (g); and

(5) The sentence, determined in accordance with subsection (f) or (h)."

this Court of the appropriateness of the death sentence in the circumstances of the case. § 414 (a) and (b). In addition to our consideration of any errors properly before us on appeal, § 414 (e) directs that in the course of our review of the sentence on the record, we must determine:

> "(1) Whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor;
>
> (2) Whether the evidence supports the jury's or court's finding of a statutory aggravating circumstance under § 413 (d);
>
> (3) Whether the evidence supports the jury's or court's finding that the aggravating circumstances are not outweighed by mitigating circumstances; and
>
> (4) Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant."

Under § 414 (f) (2), we are directed to include in our decision a reference to the "similar cases" that we considered. We are obliged by the statute to exercise one of three options: (1) affirm the death sentence, or (2) set aside the sentence and remand the case for the conduct of a new sentencing proceeding, or (3) set aside the sentence and remand for modification of the sentence to life imprisonment. § 414 (f) (1) (i)-(iii).

We turn now to a consideration of the constitutionality of Maryland's capital sentencing statute. That it is not a mandatory death penalty statute is clear. Because it allows for a broad consideration of mitigating circumstances, it plainly withstands scrutiny under *Woodson v. North Carolina*, *supra*, and *Roberts v. Louisiana*, *supra*.[18] Furthermore, it is clear that the statute complies with the

18. In a later decision, the Supreme Court concluded that imposition of a mandatory death sentence for first degree murder of a police officer constituted cruel and unusual punishment. Roberts v. Louisiana, 431 U.S. 633, 97 S. Ct. 1993, 52 L. Ed. 2d 637 (1977).

three general methods of guiding the discretion vested in the sentencing authority under *Gregg*, *Proffitt*, and *Jurek*. The statute provides a bifurcated trial procedure, and the imposition of the death penalty is limited to cases in which the sentencing authority finds at least one aggravating circumstance. The sentencing authority is required to consider the existence of mitigating circumstances. A sentence of death may be imposed only if the mitigating circumstances do not outweigh the aggravating circumstances. Although the sentencing authority still has discretion under the statute, it is guided by clear and objective standards. *See Gregg v. Georgia*, *supra*, 428 U.S. at 197-98.

Moreover, the statutory scheme incorporates the third major safeguard against arbitrariness, *i.e.*, the expedited automatic appeal of all death sentences to this Court. As indicated, we are enjoined by statute to review each sentence of death and determine whether it was arbitrarily imposed, whether the evidence supports the finding of the existence of an aggravating circumstance and whether it is not outweighed by mitigating circumstances and, finally, whether the sentence is disproportionate to sentences imposed in similar cases. In short, we hold that, on its face, the Maryland statutory scheme for imposition of the death penalty satisfies the requirements of the Eighth and Fourteenth Amendments to the federal constitution, and Art. 25 of the Maryland Declaration of Rights.

(B)

Tichnell next maintains that § 413 violates due process by reason of the standards of proof required by the section, and by its allocation of the burdens of proof respecting the existence of mitigating circumstances and the balancing of mitigating and aggravating circumstances. He argues that sentencing determinations under § 413 must be made on the basis of proof beyond a reasonable doubt, not on the basis of a preponderance of the evidence. Tichnell's position is supported by an amicus brief filed by the Public Defender.

Relying on *In re Winship*, 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970), and *Mullaney v. Wilbur*, 421 U.S. 684, 95 S. Ct. 1881, 44 L. Ed. 2d 508 (1975), it is suggested that due process requires the prosecution to assume the burden of proving beyond a reasonable doubt the absence of any mitigating circumstances enumerated in § 413 (g) that are raised by the accused in the penalty phase of trial. It is contended that due process also requires the State to assume the burden of proving beyond a reasonable doubt that the aggravating circumstances outweigh the mitigating circumstances.

Section 413 does not explicitly specify which party has the burden of producing evidence and the burden of persuasion. Instead, § 413 speaks in terms of requiring the sentencing authority to make findings that satisfy either the reasonable doubt or the preponderance of evidence standard; the section involves a three-step procedure. First, as a condition precedent to the imposition of the death penalty, the sentencing authority must find beyond a reasonable doubt that at least one aggravating circumstance has been proved. § 413 (f). As to this, the State bears both the risk of nonproduction and nonpersuasion. The second step requires that the sentencing authority consider whether, by a preponderance of the evidence, a mitigating circumstance exists. § 413 (g). This provision does not require the prosecution to disprove the existence of mitigation, thus placing on the accused the risk of nonproduction and nonpersuasion. Finally, if the sentencing authority finds, by a preponderance of the evidence, that the mitigating circumstances do not outweigh the aggravating circumstances, the death penalty must be imposed. § 413 (h) (2). Because the State is attempting to establish that the imposition of the death penalty is an appropriate sentence, the statute places the risk of nonpersuasion on the prosecution with respect to whether the aggravating factors outweigh the mitigating factors.

We find nothing in *Winship* and *Mullaney* to justify Tichnell's due process argument. In *Winship*, the Supreme

Court invalidated a procedure which, in the adjudicatory stage of juvenile delinquency proceedings, required the prosecution to prove delinquency, but only by a preponderance of the evidence. The Court noted that:

> " 'There is always in litigation a margin of error, representing error in factfinding, which both parties must take into account. Where one party has at stake an interest of transcending value — as a criminal defendant his liberty — this margin of error is reduced as to him by the process of placing on the other party the burden of * * * persuading the factfinder at the conclusion of the trial of his guilt beyond a reasonable doubt. Due process commands that no man shall lose his liberty unless the Government has borne the burden of * * * convincing the factfinder of his guilt.' " 397 U.S. at 364.

The reasonable doubt standard was referred to in *Winship* as a "prime instrument for reducing the risk of *convictions* resting on factual error," while the due process clause was said to protect the accused "against *conviction* except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." Id. at 363-64 (emphasis added).

Mullaney invalidated a Maine statute which required the defendant to prove by a preponderance of the evidence provocation as a defense to murder in order to reduce the offense to manslaughter. The Court held that the due process clause requires the prosecution to prove beyond a reasonable doubt the absence of provocation when the issue is properly raised in a homicide case.

Tichnell argues that the rationale of *Winship* and *Mullaney* is applicable to the death sentencing procedure in § 413, and consequently no burden may be imposed on him to establish circumstances sufficient to avoid the imposition of the death penalty. We disagree.

The principles articulated in *Winship*, and in *Mullaney*,

as later modified in *Patterson v. New York*, 432 U.S. 197, 97 S. Ct. 2319, 53 L. Ed. 281 (1977), do not require the prosecution to either prove beyond a reasonable doubt the absence of mitigating circumstances, or to prove beyond a reasonable doubt that the aggravating circumstances outweigh the mitigating circumstances.

In *Patterson*, the Supreme Court held that the defendant's conviction of murder did not violate the due process clause by requiring that he prove by a preponderance of the evidence the affirmative defense of extreme emotional disturbance in order to reduce the offense to manslaughter. The Court rejected the argument that this defense was indistinguishable from the provocation defense raised in *Mullaney*. The Court relied on the line of cases approving placement of the burden of persuasion of insanity on the defendant. *See Leland v. Oregon*, 343 U.S. 790, 72 S. Ct. 1002, 96 L. Ed. 1302 (1952). It said:

> "Among other things, it is normally 'within the power of the State to regulate procedures under which its laws are carried out, including the burden of producing evidence and the burden of persuasion,' and its decision in this regard is not subject to proscription under the Due Process Clause unless 'it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.'" 432 U.S. at 201-02.

The Court further noted that:

> "To recognize at all a mitigating circumstance does not require the State to prove its non-existence in each case in which the fact is put in issue, if in its judgment this would be too cumbersome, too expensive, and too inaccurate.
>
> "We thus decline to adopt as a constitutional imperative, operative countrywide, that a State must disprove beyond a reasonable doubt every fact constituting any and all affirmative defenses

> related to the culpability of an accused. Traditionally, due process has required that only the most basic procedural safeguards be observed; more subtle balancing of society's interests against those of the accused have been left to the legislative branch." *Id.* at 209-10.

We think that the burdens of persuasion as specified in § 413 are in accordance with the principles articulated in *Patterson*.

Additional support for the constitutionality of Maryland's capital sentencing determinations is found in *Gregg*, *Proffitt* and *Jurek*. In these decisions the statutory schemes that were upheld under the Eighth and Fourteenth Amendments to the federal constitution did not require the prosecution to prove the absence of mitigating circumstances beyond a reasonable doubt. It is also noteworthy that except for the statutory scheme considered in *Proffitt*, the statutes considered in these cases did not explicitly require that the sentencing authority find that the aggravating circumstances outweighed the mitigating circumstances prior to imposing a sentence of death. The *Proffitt* scheme, however, did not specify either a preponderance or a reasonable doubt standard for this determination. The other statutes, considered in *Gregg* and *Jurek*, did not expressly call for a balancing process; instead, they merely required that mitigating circumstances "be considered" if the sentencing authority found that the existence of aggravating circumstances was proven beyond a reasonable doubt. The Maryland sentencing determinations specified in § 413 plainly withstand scrutiny under *Gregg*, *Proffitt* and *Jurek*.

Other jurisdictions that have considered the burdens of persuasion under a statutory scheme similar to § 413 have held that due process does not require the State to prove beyond a reasonable doubt the absence of mitigating circumstances. *See, e.g., State v. Watson*, 120 Ariz. 441, 586 P.2d 1253, 1258-259 (1978), *cert. denied*, 440 U.S. 924, 99 S. Ct. 1254, 59 L. Ed. 2d 478 (1979); *State v. Pierre*, 572 P.2d

1338, 1346-348 (Utah 1977), *cert. denied*, 439 U.S. 882, 99 S. Ct. 219, 58 L. Ed. 2d 194 (1978); *State v. Barfield*, 298 N.C. 306, 259 S.E.2d 510, 543-44 (1979); *State v. Johnson*, 298 N.C. 47, 257 S.E.2d 597, 617-18 (1979). The statutory scheme of § 413, in short, complies with the requirements of the due process clause of the federal constitution.

(C)

On January 18, 1979, the date of Tichnell's offenses, the Maryland capital penalty statute existed in its present form with one exception. Subsection (g)(8) was added to § 413 by ch. 521 of the Acts of 1979 and became effective on July 1, 1979, two months before Tichnell's trial. It directs the sentencing authority to consider: "Any other facts which the jury or the court specifically sets forth in writing that it finds as mitigating circumstances in the case." This provision was added to § 413 after the Supreme Court's decision in *Lockett v. Ohio*, 438 U.S. 586, 98 S. Ct. 2954, 57 L. Ed. 2d 973 (1978), a case in which the Ohio death penalty statute was invalidated because it too narrowly limited the discretion of the sentencing authority to consider mitigating circumstances. The plurality in *Lockett* concluded that the Eighth and Fourteenth Amendments require

> "that the sentencer, in all but the rarest kind of capital case, not be precluded from considering *as a mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." *Id.* at 604 (emphasis in original).

It is contended that the death sentencing procedure under § 413 in effect at the time the murder was committed was unconstitutional under *Lockett* because the subsequent prosecution of Tichnell under the amended version of § 413.

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which cured the previous infirmities, violated the *ex post facto* clause of the Maryland Declaration of Rights.[19]

Assuming without deciding that § 413, without the addition of subsection (g) (8), was unconstitutional under *Lockett*, the 1979 amendment did not violate the *ex post facto* clauses of the state and federal constitutions. The Supreme Court in *Dobbert v. Florida*, 432 U.S. 282, 97 S. Ct. 2290, 53 L. Ed. 2d 344 (1977), considered a death penalty statute that had been amended between the time of the offense and the time of the trial, and decided that the change did not constitute an *ex post facto* violation. In that case, the trial judge, acting pursuant to statutory authority, overruled the jury's recommendation that the defendant be sentenced to life imprisonment, and imposed a sentence of death. The Supreme Court held that the new statute in effect at the time of trial, which gave the jury only the right of an advisory determination, did not constitute an *ex post facto* violation when the pre-*Furman* statute in effect at the time the offenses were committed required the imposition of the death penalty unless the jury recommended mercy. In defining the characteristics of an *ex post facto* law, the Court noted

> " 'that any statute which punishes as a crime an act previously committed, which was innocent when done; which makes more burdensome the punishment for a crime, after its commission, or which deprives one charged with crime of any defense available according to law at the time when the act was committed, is prohibited as *ex post facto*.' " 432 U.S. at 292.

The Court found no *ex post facto* violation because it held that the changes in the statute were only procedural and ameliorative. Responding to the argument of the defendant

19. Article 17 provides:
"That retrospective Laws, punishing acts committed before the existence of such Laws, and by them only declared criminal, are oppressive, unjust and incompatible with liberty: wherefore, no *ex post facto* Law ought to be made; nor any retrospective oath or restriction be imposed, or required."

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that no valid death penalty statute was in effect at the time the crime was committed, the Court stated:

> "[T]his sophistic argument mocks the substance of the *Ex Post Facto* Clause. Whether or not the old statute would, in the future, withstand constitutional attack, it clearly indicated Florida's view of the severity of murder and of the degree of punishment which the legislature wished to impose upon murderers. The statute was intended to provide maximum deterrence, and its existence on the statute books provided fair warning as to the degree of culpability which the State ascribed to the act of murder.
>
> ". . . Here the existence of the statute served as an 'operative fact' to warn the petitioner of the penalty which Florida would seek to impose on him if he were convicted of first-degree murder. This was sufficient compliance with the *ex post facto* provision of the United States Constitution." 432 U.S. at 297-98.

Although it is undisputed that *Dobbert* renders meritless an argument based on the federal *ex post facto* clause, the argument is nevertheless made that the Maryland prohibition on *ex post facto* laws is applicable. Article 17 of the Maryland Declaration of Rights parallels the federal clause, *see Calder v. Ball*, 3 Dall. 386, 389, 1 L. Ed. 648, 650 (1798); *Elliott v. Elliott*, 38 Md. 357, 362 (1873); *Lynn v. State*, 84 Md. 67, 78, 35 A. 21 (1896),[20] and the Supreme Court's interpretation of the federal *ex post facto* clause is persuasive authority.

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20. In construing Virginia's legislatively enacted "*ex post facto* clause," the Virginia Supreme Court viewed *Dobbert* as authority to uphold a death sentence for a crime committed before the effective date of the state death penalty statute. Smith v. Commonwealth, 219 Va. 455, 248 S.E.2d 135 (1978), *cert. denied*, 441 U.S. 967, 99 S. Ct. 2419, 60 L. Ed. 2d 1074 (1979). *Contra*, Miller v. State, 584 S.W.2d 758 (Tenn. 1979) (state constitutional prohibition against *ex post facto* laws invalidated the death sentence when the defendant committed the crime at a time the Tennessee death penalty statute was unconstitutional).

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The change in § 413 by the addition of subsection (g) (8) was clearly procedural. In the words of *Dobbert*:

> "The new statute simply altered the methods employed in determining whether the death penalty was to be imposed; there was no change in the quantum of punishment attached to the crime." 432 U.S. at 293-94.

Furthermore, assuming that the addition of subsection (g) (8) was necessary to comply with *Lockett*, the change did not make the statute more onerous, but instead afforded the defendant significant new safeguards. Moreover, we repeat the observation of the Supreme Court in *Dobbert* that the defendant had fair warning as to the degree of culpability which Maryland ascribes to the act of murder. We think it clear that Article 17 of the Maryland Declaration of Rights was not violated in this case.

(D)

It is next contended that Article 23 of the Maryland Declaration of Rights permits a jury to reach arbitrary sentencing decisions in violation of the constitutional requirements of *Gregg v. Georgia*, *supra*. Article 23 provides in pertinent part:

> "In the trial of all criminal cases, the Jury shall be the Judges of Law, as well as of fact, except that the Court may pass upon the sufficiency of the evidence to sustain a conviction."

Maryland Rule 757 b implements this constitutional provision and requires:

> "In every case in which instructions are given to the jury the court shall instruct the jury that they are the judges of the law and that the court's instructions are advisory only."

It is argued that counsel may as a matter of right argue to the jury a position contrary to the court's instructions, *see*

Dillon v. State, 277 Md. 571, 581, 357 A.2d 360 (1976); *Wilson v. State*, 239 Md. 245, 255, 210 A.2d 824 (1965); *Schanker v. State*, 208 Md. 15, 21-22, 116 A.2d 363 (1955), and consequently the jury is unconstitutionally made the final arbiter as to the law governing the imposition of the death penalty. Because the jury is told that it is the judge of the law, the contention is advanced that there is no way to ensure compliance with the safeguards placed on the sentencer's discretion by § 413.

The short answer to this argument is that a claim based on Article 23 is not presented by this case. As permitted by § 413 (b) (3), Tichnell waived his right to a jury determination of sentence and elected to have the judge make the decision. Although in making his election, Tichnell expressed concern that the jury would improperly consider inflammatory evidence presented at the guilt stage of his trial, there is no suggestion in the record that the waiver was prompted by a fear that Article 23 vests the jury with the power to disregard the statutory sentencing criteria. Thus, the facts of this case do not present a claim based on Article 23.

(E)

Section 414 (e) requires that, in reviewing the death sentence imposed upon Tichnell, we determine (1) whether the sentence was imposed under the influence of passion, prejudice, or any other arbitrary factor; (2) whether the evidence supports the sentencer's finding of a statutory aggravating circumstance; (3) whether the evidence supports the sentencer's finding that aggravating circumstances outweigh mitigating circumstances; and finally

> "(4) Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant."

Section 414 (e) appears to be patterned after the appellate review provision of the Georgia death penalty statute approved in *Gregg v. Georgia, supra*, 428 U.S. 153 (1976).[21] In that case, the Supreme Court noted that the appellate review provision of the Georgia capital-sentencing scheme functions as a check against the arbitrary imposition of the death penalty. *Id.* at 206.

Given the identity of language and purpose of the proportionality provision of § 414 (e) (4) and the sentence review provision approved in *Gregg*, the Georgia provision may be utilized as a guideline for our review determinations. The proportionality review provision (also referred to as the comparative review clause), as interpreted by the Georgia Supreme Court, requires the setting aside of a death sentence as excessive if it is " 'rarely imposed for an act or it is substantially out of line with sentences imposed for other acts.' " *Coley v. State*, 231 Ga. 829, 204 S.E.2d 612, 616 (1974). Under this provision, the Georgia Supreme Court has held that a death sentence in a murder case may be affirmed only if juries generally throughout the state have imposed the death penalty for that kind of offense. *Jarrell v. State*, 234 Ga. 410, 216 S.E.2d 258, 270 (1975). As summarized in *Gregg*, the proportionality review provision of the Georgia statute

> "substantially eliminates the possibility that a person will be sentenced to die by the action of an aberrant jury. If a time comes when juries generally do not impose the death sentence in a certain kind

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21. In considering the appropriateness of a death sentence, the Supreme Court of Georgia is directed to consider:

> " '(1) Whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor, and
> '(2) Whether . . . the evidence supports the jury's or judge's finding of a statutory aggravating circumstance . . ., and
> '(3) Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.' " 428 U.S. at 167-68.

The identical language appears in § 414 (e). The only significant difference between the two provisions is that § 414 (e) contains an additional determination in paragraph (3).

> of murder case, the appellate review procedures assure that no defendant convicted under such circumstances will suffer a sentence of death." 428 U.S. at 206.

Further insight into the purpose and constitutional necessity of the provisions of § 414 (e) may be gained by examining the appellate review procedures upheld in *Proffitt v. Florida, supra*, 428 U.S. at 242, and in *Jurek v. Texas, supra*, 428 U.S. 262. These decisions reveal that the absence of a specific provision for proportionality review, as found in § 414 (e) (4), will not render a death penalty statute constitutionally infirm. *Proffitt* noted that while the Florida statute contained no express provision for proportionality review, the Florida Supreme Court considers its review function to be similar to that of the Georgia Supreme Court, namely, to

> "'[guarantee] that the [aggravating and mitigating] reasons present in one case will reach a similar result to that reached under similar circumstances in another case. . . . If a defendant is sentenced to die, this Court can review that case in light of the other decisions and determine whether or not the punishment is too great.'" 428 U.S. at 251, *citing State v. Dixon*, 283 So. 2d 1, 10 (Fla. 1973).

The Texas statute upheld in *Jurek v. Texas, supra*, 428 U.S. 262, provided for an automatic appeal, but also lacked an express provision for proportionality review. The Court nevertheless assumed that death sentences were subject to this type of review, stating:

> "By providing prompt judicial review of the jury's decision in a court with statewide jurisdiction, Texas has provided a means to promote the evenhanded, rational, and consistent imposition of death sentences under law. Because this system serves to assure that sentences of death will not be

> 'wantonly' or 'freakishly' imposed, it does not violate the Constitution." 428 U.S. at 276.

The essential principle underlying the varieties of proportionality review upheld in *Gregg, Proffitt,* and *Jurek* is, in short, the guarantee that death sentences will be imposed in a reasonably consistent manner. *See People v. Frierson,* 158 Cal. Rptr. 281, 599 P.2d 587, 610 (1979).

With these principles in mind, the question arises as to how we are to determine under § 414 (e) (4) whether Tichnell's sentence "is excessive or disproportionate to the penalty imposed in *similar cases,* considering both the crime and the defendant." (Emphasis supplied.) Because this is the first case to reach us for review under the 1978 death penalty statute, we are presented with an apparent dilemma of how to proceed with a comparative review of similar cases. On the one hand, if we, out of necessity for finding a similar case, compare Tichnell's sentence with cases decided under the constitutionally infirm pre-*Furman* and pre-*Gregg* statutes, we thereby use as the basis of our comparison cases in which life sentences may have been imposed if they had been decided under the present statute. Cases tried under previous Maryland statutes gave the sentencing authority unbridled discretion in deciding whether life imprisonment or death was the appropriate punishment. The other horn of the dilemma is that if no similar cases exist under either the present or past statutes, then it is impossible to complete the review mandated by § 414 (e) (4).

There are several ways to avoid the conclusion that the comparative sentence review mandated by § 414 (e) (4) can never be implemented. The first approach, sanctioned in *Gregg,* is to cautiously employ pre-*Furman* cases in the comparative review examination. That case recognized that this practice was a matter of necessity at the inception of a new sentencing procedure. 428 U.S. at 204 n. 56. Several states have followed this approach. *See Jacobs v. State,* 361 So. 2d 640, 644-45 (Ala. 1978), *cert. denied,* 439 U.S. 1122, 99 S. Ct. 1034, 59 L. Ed. 2d 83 (1979); *Ross v. State,* 233 Ga. 301, 211 S.E.2d 356, 360 (1974); *Deutscher v. State,* 601 P.2d

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407, 419 (Nev. 1979); *Bell v. State*, Miss., 360 So. 2d 1206, 1214 (1973), *cert. denied*, 440 U.S. 950, 99 S. Ct. 1433, 59 L. Ed. 2d 640 (1979); *Smith v. Com.*, 219 Va. 455, 248 S.E.2d 135, 151 (1978), *cert. denied*, 441 U.S. 967, 99 S. Ct. 2419, 60 L. Ed. 2d 1074 (1979). Other states have restricted the scope of comparison to cases decided under constitutionally approved death penalty statutes. *See Collins v. State*, 261 Ark. 195, 548 S.W.2d 106, 122, *cert. denied*, 434 U.S. 878, 98 S. Ct. 231, 54 L. Ed. 2d 158 (1977); *State v. White*, 395 A.2d 1082, 1095-96 (Del. Supr. 1978); *State v. Martin*, 376 So. 2d 300, 312-13 (La. 1979); *State v. Simants*, 197 Neb. 549, 250 N.W.2d 881, 890, *cert. denied*, 434 U.S. 878, 98 S. Ct. 231, 54 L. Ed. 2d 158 (1977); *State v. Shaw*, S.C., 255 S.E.2d 799, 807 (1979), 444 U.S. 957, 100 S. Ct. 437, 62 L. Ed. 2d 329.[22] Furthermore, most states restrict their consideration of similar cases to cases decided under their own state law. *See, e.g., Collins v. State, supra*, 548 S.W.2d at 122; *State v. White, supra*, 395 A.2d at 1096; *Moore v. State*, 233 Ga. 861, 213 S.E.2d 829, 833 (1975), *cert. denied*, 428 U.S. 910, 96 S. Ct. 3222, 49 L. Ed. 2d 1218 (1976); *Deutscher v. State, supra*, 601 P.2d at 418; *State v. Shaw, supra*, 255 S.E.2d at 807; *Coppola v. Com.*, 220 Va. 243, 257

22. In Smith v. Com., *supra*, the Virginia Supreme Court recognized that capital cases tried under prior constitutionally defective statutes involved definitionally different offenses. In affirming a death sentence under the new 1977 statute, the court, nevertheless, apparently relied on a comparison drawn from death sentences imposed over the course of seven decades. 248 S.E.2d at 151. In Collins v. State, *supra*, the Supreme Court of Arkansas simply reviewed the evidence in the case and concluded that the aggravating circumstances outweighed the mitigating circumstances. In affirming the death sentence, the court stated that it was unable to find a similar case in which a death sentence was reduced to life imprisonment. 548 S.W.2d at 122. The Supreme Court of Nebraska found it useful to analyze the proportionality review question in terms of whether the court has been able to find a similar case in which a life sentence was imposed. If no such case is found, a death sentence is assumed to be appropriate. *See* State v. Williams, 205 Neb. 56, 287 N.W.2d 18, 29-30 (1979). The Supreme Court of Louisiana in State v. Martin, *supra*, simply reviewed the evidence, and even though no similar cases were referred to, found that the death sentence was not disproportionate to the penalty imposed in similar cases. 376 So. 2d at 313. In State v. Simants, *supra*, 250 N.W.2d at 894, one of the first decisions under the state's new death penalty statute, the Supreme Court of Nebraska reviewed and affirmed a death sentence in light of a comparison with cases decided under the same statute in which no similar cases were referred to.

S.E.2d 797 (1979). *Contra, Bell v. State, supra*, 360 So. 2d at 1214-15.[23]

An alternative approach to considering pre-*Furman* cases is simply to recognize that a system of review that requires a comparison with similar cases must have a beginning. *State v. Shaw, supra*. Under this approach, the reviewing court has recognized that the first case under the new statutory scheme cannot be compared to similar cases that have been decided under the statute. Under this view, the first case must stand by itself, otherwise comparative review would be impossible — a determination at odds with the presumption that a legislative body does not intend to enact an ineffective and inoperative statute. *See, e.g., Swarthmore Co. v. Kaestner*, 258 Md. 517, 525, 266 A.2d 341 (1970); *Welsh v. Kuntz*, 196 Md. 86, 98, 75 A.2d 343 (1950).

These difficult questions, as well as others which we do not here delineate, need not be reached in this case because, as Tichnell suggests, the death sentence was imposed upon him under the influence of an "arbitrary factor" in violation of § 414 (e) (1). He argues that in selecting Judge Pollitt, rather than the jury as the sentencing authority, he was prejudicially misled by a remark made by the trial judge. In commenting on the sentencing judge's report to this Court, as authorized by Rule 772A, Tichnell's counsel filed an affidavit which stated that during a trial recess prior to the completion of the evidence in the case, Judge Pollitt made the following in-chambers comment in his presence, and in the presence of the State's Attorney: "[H]e thought that the jury could in the case return a first degree murder verdict, but that 'I am not sure this is a death sentence case.'" The State's Attorney also filed an affidavit concerning the

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23. Other jurisdictions have considered cases involving the murder of a police officer. *See* Holmes v. State, 374 So. 2d 944 (Fla. 1979) (death sentence affirmed despite defendant's lack of a criminal record). *See also* Cade v. State, Ala. Cr. App., 375 So. 2d 802, *aff'd* 375 So. 2d 828 (1979) (death sentence upheld, aggravating circumstances outweighed mitigating circumstances).

alleged comment, stating that Judge Pollitt "said in effect that he was not sure that the Jury would buy Tichnell's version, but wasn't sure that they would impose the death sentence or that it was a death sentence case." In his affidavit, the State's Attorney said that the comment "in no way, inferred *to the State's Attorney* Judge Pollitt's personal feelings, if any, concerning the case." (Emphasis supplied.) Judge Pollitt, in a letter to Tichnell's counsel, included in the record, stated that he remembered his in-chambers comment, but that it did not indicate "any feeling of mine as to whether the death sentence would be appropriate in this case." Instead, he said, "I very probably stated in casual conversation that I was not sure that a jury would be able to agree on a death sentence, since I had previously experienced such inability to agree, in a case equally as serious."

It is, of course, impossible for us to know whether Tichnell's waiver of a jury determination of sentencing was actually based on a belief, generated by Judge Pollitt's remark, that he would not impose the death sentence if he was the sentencing authority. Tichnell claims that he was advised of Judge Pollitt's remark and was influenced by it in selecting him as the sentencing authority. The affidavit of the State's Attorney attesting to the words said by Judge Pollitt supports, rather than detracts, from Tichnell's version of the import of the remark. At the least, the remark was ambiguous and subject to the impression that Judge Pollitt did not think that the case was one which deserved the death penalty. Notwithstanding Judge Pollitt's contrary recollection of what he said, we think, in the circumstances, the imposition of the death sentence was influenced by an "arbitrary factor" under § 414 (e) (1), requiring that it be set aside and the case remanded for a new sentencing proceeding under § 413. Tichnell may, at the resentencing hearing, exercise the options available to him under § 413 and elect either a jury or a judge as the sentencing authority. Should he choose the latter, a judge

other than Judge Pollitt should preside, if Tichnell so requests.[24]

Judgments affirmed, except as to the imposition of the death sentence; death sentence vacated and case remanded to the Circuit Court for Wicomico County for a new sentencing proceeding under § 413 of Art. 27; each party to pay own costs.

Cole, J., concurring:

I concur in the result, there being, in my opinion, no necessity to reach the constitutional issues in the case.

Davidson, J., concurring:

I concur in the result.

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24. In the post-sentence report required to be filed by the trial judge under Rule 772A, Judge Pollitt indicated that according to a Fairmont, West Virginia police report, Tichnell said on November 3, 1977 "that he would 'kill a cop' the next time arrested." Tichnell disputed the authenticity of this notation on the police report and his position was supported by an affidavit of the Police Chief of Fairmont. At Tichnell's resentencing hearing, the State may, if it wishes, adduce any evidence "that the court deems of probative value and relevant to sentence, provided the defendant is accorded a fair opportunity to rebut any statements." § 413 (c) (v) of Art. 27.

Misc. No.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

RICHARD DANNY TICHNELL

and

JAMES ARTHUR CALHOUN,

Petitioners

v.

STATE OF MARYLAND,

Respondent

APPENDIX TO PETITION FOR

WRIT OF CERTIORARI

APPENDIX B

Opinion of the Court of Appeals of Maryland in Tichnell v. State, 290 Md. 43, 427 A.2d 991 (1981), filed on April 6, 1981 ..... B.1

43] Syllabus.

RICHARD DANNY TICHNELL v. STATE OF MARYLAND

[No. 60, September Term, 1980.]

Decided April 6, 1981.

CRIMINAL LAW — *First Degree Murder — Sentencing By Jury — Statute Governs Jury's Role In Sentencing Where State Seeks Death Penalty — Jury Determines From Admissible Evidence Whether Any Of Enumerated Aggravating Circumstances Have Been Established Beyond A Reasonable Doubt And Whether, By Preponderance Of Evidence, Any Of Enumerated Mitigating Circumstances Exist — Jury Must Impose Life Sentence If No Aggravating Circumstances Are Found Or If, It Finds, By Preponderance Of Evidence, That Mitigating Circumstances Outweigh Aggravating Circumstances — Code (1957, 1976 Repl. Vol., 1980 Cum. Supp.) Art. 27, §§ 412-414.* pp. 45-47

CRIMINAL LAW — *First Degree Murder — Sentencing Hearing Where State Seeks Death Penalty — Confrontation Clause Of Sixth Amendment Held To Prohibit Use Of Prior Recorded Trial Testimony To Prove Aggravating Or Mitigating Circumstances Before New Jury Under Code (1957, 1976 Repl. Vol., 1980 Cum. Supp.) Art. 27, § 413 (c) — Where Sentencing Jury Did Not Hear Trial Testimony, Live Witnesses Should Testify At Sentencing Hearing Absent Showing Of Unavailability.* Where defendant's original death sentence for first degree murder was vacated on appeal and a new jury was impaneled to hear evidence of aggravating and mitigating circumstances in a sentencing hearing, and where there was no showing that witnesses were unavailable, the Court *held* that the trial court erred in admitting, over timely objection, the prior recorded trial testimony to prove the existence or absence of aggravating or mitigating circumstances. The case was remanded for resentencing, after presentation of relevant testimony through witnesses on the issues to be decided by the jury under § 413. pp. 48-64

J. A. A.

Review of Sentence (Rule 898) from the Circuit Court for Wicomico County (TRUITT, J.).

Richard Danny Tichnell, having been convicted of first degree murder, was sentenced to death by a jury pursuant to Code (1957, 1976 Repl. Vol., 1980 Cum. Supp.) Art. 27, § 413.

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The Court reviewed the sentence to determine if it comported with statutory and constitutional requirements.

Death sentence vacated. Case remanded for a new sentencing proceeding under Art. 27, § 413. Costs to be paid by the County Commissioners of Garrett County.

The cause was argued before MURPHY, C. J., and SMITH, DIGGES, ELDRIDGE, COLE, DAVIDSON and RODOWSKY, JJ.

Clark B. Frame, with whom was *G. Gary Hanna* on the brief, for appellant.

Deborah K. Handel, Assistant Attorney General, with whom was *Stephen H. Sachs, Attorney General*, on the brief, for appellee.

MURPHY, C. J., delivered the opinion of the Court. DAVIDSON, J., concurs in the result.

This case involves Maryland's capital punishment statute, Maryland Code (1957, 1976 Repl. Vol., 1980 Cum. Supp.), Art. 27, §§ 412-414, and whether the death sentence imposed by a jury upon Richard Tichnell comported with statutory and constitutional requirements.

(1)

On January 18, 1979, at approximately 5:25 a.m., Tichnell and a confederate, Oscar Recek, broke into a store near Oakland, Maryland and stole ten handguns. Within minutes after leaving the store, Tichnell was accosted by Deputy Sheriff David Livengood, who had been dispatched to the scene in response to a silent alarm activated by the storehouse breaking. In the course of their encounter, Tichnell shot and killed the deputy. Thereafter, Recek and Tichnell took Deputy Livengood's police cruiser and fled the scene. They were apprehended later that morning in West Virginia. At that time, Tichnell admitted to the police that he had shot Deputy Livengood, but claimed the shooting was in justifiable self-defense. In his statement, Tichnell told the

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police that he had submitted to arrest by Livengood and was directed to lie on the ground under guard by the deputy's K-9 dog. Tichnell said that when he moved his head, the dog bit him in the eye, after which he ran to his nearby car to get his medical kit to bandage his eye. According to Tichnell's statement, Livengood followed him and without provocation shot him in the shoulder, propelling him backwards through the open front door of his car. As Livengood prepared to fire at him again, Tichnell said he retrieved his own gun, which was under the front seat of his car, and after the deputy had fired at him a second time, Tichnell shot the deputy four or five times at close range.

Tichnell was indicted on March 2, 1979 for first degree murder. Pursuant to Code, Art. 27, § 412 (b), the State notified Tichnell that it sought imposition of the death penalty.

At Tichnell's jury trial, the State presented a number of witnesses to establish that he had murdered the deputy in cold blood as he was interrupted in his departure from the scene of the storehouse breaking. Tichnell's testimony in his own behalf was consistent with the statement which he had given to the police at the time of his arrest. The only eyewitness to the shooting, Oscar Recek, was also indicted for the offense and did not testify. The jury rejected Tichnell's version of the killing and found him guilty of wilful, deliberate and premeditated first degree murder.

Tichnell elected to be sentenced by the trial judge, rather than by the jury, as authorized by § 413 (b) (3). The judge imposed the death penalty. On appeal, we affirmed the judgment of conviction but vacated the death sentence on the ground that it had been imposed under the influence of an "arbitrary factor" in violation of § 414 (e) (1). *Tichnell v. State*, 287 Md. 695, 415 A.2d 830 (1980). As required by the provisions of § 414 (f) (1) (ii), we remanded the case "for a new sentencing proceeding under § 413." *Id.* at 748.

On remand, Tichnell elected to be resentenced by a new jury, as authorized by § 413 (b) (2) (iv). It was the sole function of the jury to determine whether Tichnell should be

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sentenced to death or life imprisonment. § 413 (a). In making that determination, the jury was governed by various subsections of § 413. The "type of evidence" admissible at the sentencing hearing is delineated in § 413 (c):

> "(i) Evidence relating to any mitigating circumstance listed in subsection (g);
>
> (ii) Evidence relating to any aggravating circumstance listed in subsection (d) of which the State had notified the defendant pursuant to § 412(b);
>
> (iii) Evidence of any prior criminal convictions, pleas of guilty or nolo contendere, or the absence of such prior convictions or pleas, to the same extent admissible in other sentencing procedures;
>
> (iv) Any presentence investigation report. However, any recommendation as to sentence contained in the report is not admissible; and
>
> (v) Any other evidence that the court deems of probative value and relevant to sentence, provided the defendant is accorded a fair opportunity to rebut any statements."

Under § 413 (d), it is the province of the sentencing jury to determine from the evidence whether any of the aggravating circumstances enumerated in that section, and relied upon by the State for the imposition of the death penalty, have been established beyond a reasonable doubt.[1] Under § 413

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1. Section 413 (d) sets forth ten aggravating circumstances, *i.e.*:

> "(1) The victim was a law enforcement officer who was murdered while in the performance of his duties.
>
> (2) The defendant committed the murder at a time when he was confined in any correctional institution.
>
> (3) The defendant committed the murder in furtherance of an escape or an attempt to escape from or evade the lawful custody, arrest, or detention of or by an officer or guard of a correctional institution or by a law enforcement officer.
>
> (4) The victim was a hostage taken or attempted to be taken in the course of a kidnapping or abduction or an attempt to kidnap or abduct.
>
> (5) The victim was a child abducted in violation of § 2 of this article.

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(g), the jury is required to determine, by a preponderance of the evidence, whether any of eight enumerated mitigating circumstances exist.[2] Should the jury not find, beyond a reasonable doubt, the existence of one or more aggravating circumstances, it is required to impose a life sentence. § 413 (f). Should the jury find the existence of both aggravating and mitigating circumstances, it then must determine, by a preponderance of the evidence, whether "the mitigating circumstances outweigh the aggravating circumstances." § 413 (h) (1). If the jury finds "that the mitigating circumstances do not outweigh the aggravating circumstances, the sentence shall be death." § 413 (h) (2). If the jury finds "that the mitigating circumstances outweigh the aggravating circumstances, the sentence shall be imprisonment for life." § 413 (h) (3).

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(6) The defendant committed the murder pursuant to an agreement or contract for remuneration or the promise of remuneration to commit the murder.

(7) The defendant engaged or employed another person to commit the murder and the murder was committed pursuant to an agreement or contract for remuneration or the promise of remuneration.

(8) At the time of the murder, the defendant was under sentence of death or imprisonment for life.

(9) The defendant committed more than one offense of murder in the first degree arising out of the same incident.

(10) The defendant committed the murder while committing or attempting to commit robbery, arson, or rape or sexual offense in the first degree."

2. Section 413 (g) sets forth the following mitigating circumstances:

"(1) The defendant has not previously (i) been found guilty of a crime of violence; (ii) entered a plea of guilty or nolo contendere to a charge of a crime of violence; or (iii) had a judgment of probation on stay of entry of judgment entered on a charge of a crime of violence. As used in this paragraph, 'crime of violence' means abduction, arson, escape, kidnapping, manslaughter, except involuntary manslaughter, mayhem, murder, robbery, or rape or sexual offense in the first or second degree, or an attempt to commit any of these offenses, or the use of a handgun in the commission of a felony or another crime of violence.

(2) The victim was a participant in the defendant's conduct or consented to the act which caused the victim's death.

(3) The defendant acted under substantial duress, domination or provocation of another person, but not so substantial as to constitute a complete defense to the prosecution.

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(2)

At the outset of Tichnell's resentencing hearing, the trial judge stated that he intended to adhere to his decision, made earlier at a conference with counsel present, to have the transcript of Tichnell's trial read to the jury. He said that "short of having a full-blown trial, there was no other way to proceed." The trial judge said that Tichnell could object to the reading of any part of the trial transcript and he would rule on the objection at that time. Tichnell entered a "vociferous objection" to reading the transcript of the trial proceedings to the jury. He argued that § 413 (c) explicitly sets forth the "type of evidence" that could be admitted at the sentencing hearing, and did not include the introduction of the prior recorded trial testimony, as contained in the trial transcript. He said that the transcript would reveal, to his grievous prejudice, the commission of other criminal offenses for which he was neither charged nor convicted. He argued that the jury "is going to necessarily pass on the credibility of the witnesses with reference to whether or not aggravating circumstances and or mitigating circumstances exist." He maintained that the federal constitution safeguards his right to have the sentencing jury "see the witnesses [and] ... for us to adduce any additional cross-examination, which could be entirely different now than it was." The court overruled Tichnell's objection, stating that he could "rebut any testimony under the rules and under the law."

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(4) The murder was committed while the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired as a result of mental incapacity, mental disorder, emotional disturbance, or intoxication.

(5) The youthful age of the defendant at the time of the crime.

(6) The act of the defendant was not the sole proximate cause of the victim's death.

(7) It is unlikely that the defendant will engage in further criminal activity that would constitute a continuing threat to society.

(8) Any other facts which the jury or the court specifically sets forth in writing that it finds as mitigating circumstances in the case."

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After the jury was sworn, the trial judge advised it that Tichnell's guilt of first degree murder had been previously established and the jury was "merely . . . to determine the sentence"; that the transcript of Tichnell's criminal trial would be read to the jury; that the State could "expand upon that, if they have any further evidence of any probative value, and the defense, of course, may rebut and put any mitigating circumstances on which they think are probative, after which you will hear argument of counsel."

Opening statements of counsel were then made to the jury. The prosecutor outlined his version of the evidence that would be established from a reading of the trial transcript. He told the jury that he would prove the existence of two aggravating circumstances under § 413 (d), namely, that Livengood was a law enforcement officer killed in the performance of his duties, and that the murder was committed in furtherance of an escape or an attempt to escape from or evade lawful arrest by a law enforcement officer. In his opening statement, Tichnell's counsel outlined his version of the evidence adduced at the trial. He conceded that Livengood was a law enforcement officer killed in the performance of his duties, but denied that the evidence would establish that the killing took place during an escape or an attempt to evade Livengood's lawful custody. Tichnell told the jury that the evidence would establish these mitigating circumstances: that he had no prior criminal record; that the victim was a participant in his (Tichnell's) conduct; that he acted under substantial duress or provocation; that he was of a youthful age; that his act in killing the deputy was not the sole proximate cause of the deputy's death; and that since he (Tichnell) would be in prison for life, he would not be a continuing threat to society.

After opening statements were completed, the trial transcript was introduced into evidence over Tichnell's objection and two court reporters undertook to read the questions and answers of the witnesses at the trial to the sentencing jury. The testimony of seven State witnesses was read to the jury with few objections being made by Tichnell. The testimony of another State witness implicating Tichnell in the commis-

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sion of other crimes was objected to and was not read to the jury. A dispute then arose as to the "ground rules," each counsel stating a different view of what was to be done when they could not agree on the relevancy of the prior recorded testimony of the witnesses. At the court's urging, counsel agreed to consider stipulating as to the relevancy of the testimony of the remaining witnesses who testified for the State at the trial. At this point, the prosecutor moved for permission to produce live witnesses to complete the presentation of his case to the sentencing jury; the trial judge denied the request. At the same time, the court said that it was not limiting anyone in the presentation of relevant testimony. The court noted that the procedure of reading the transcript to the jury was subject to Tichnell's objection and this was so even though he agreed to stipulate to certain evidence being read to the jury from the transcript. The prosecutor objected to the procedure being followed by the court, stating that it was his understanding that the entire transcript and all the trial exhibits would be presented to the jury. At this juncture, the court said:

> "I am attempting to let this jury have some of the facts, enough so they can determine, one, that the deceased was a police officer in the performance of his duties; two, that there was an escape or attempt to escape from lawful custody, which are the elements you have alleged entitled the State of Maryland to request the death penalty. Anything other than that, I don't consider relevant."

The court said that the entire transcript would not be read to the jury but only those parts which were relevant. It told Tichnell that he could offer the testimony of any live witnesses that he might wish to call and that the State also could offer additional testimony, other than of witnesses whose testimony was included in the trial transcript. This exchange resulted in Tichnell's counsel claiming that he was being "whipsawed, with the State trying to change the rules in the middle of the stream." The court then remarked: "We are going to proceed as we started out. You may proffer any witnesses you wish."

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Both the prosecutor and Tichnell's counsel expressed continuing dissatisfaction with the procedure being followed. The trial judge again remarked that no other procedure could be utilized. Thereafter, counsel agreed to stipulate to the relevancy of the testimony of the remaining State witnesses who had testified at the trial, as well as to the admissibility of certain photographic and other trial exhibits.

After the State concluded its case-in-chief, Tichnell testified before the sentencing jury. His testimony was consistent with his testimony at the trial, the thrust of which conformed with his statement given to the police at the time of his arrest, *i.e.*, that after the storehouse breaking he was apprehended by the deputy and submitted to arrest; that he was not attempting to escape or evade lawful custody when, after he was bitten by the officer's K-9 dog, he went to his car to bandage his eye; that the officer followed him there and shot him through the shoulder without provocation; and that it was only to save his own life that he shot and killed the deputy sheriff. In his testimony, Tichnell undertook to produce evidence of mitigating circumstances, as enumerated in § 413 (g). Tichnell's wife and mother testified in his behalf.

The court permitted the prosecutor to call one live rebuttal witness to testify — a forensic chemist who sought to rebut Tichnell's testimony that the shooting was at point-blank range. It was the chemist's testimony that because there were no powder burns on the shoulder portion of Tichnell's jacket, the shooting could not have occurred consistent with Tichnell's version of the event.

The trial judge then instructed the sentencing jury. He said that because the jury had not heard the evidence in the original case, counsel and the court had attempted to give the jury "at least the basic facts as they were presented to that previous jury." He reminded the jury that it "did not see or hear, save for a few, the actual witnesses or the testimony as it was originally presented." Having parts of the trial transcript read to the jury was, the trial judge said, "the only

way the Court could see to produce the actual testimony as it was given." The court continued:

> "Obviously, with human frailties, had we brought the witnesses back there may be some variance in the testimony. But we felt that you were entitled to hear, even though you didn't hear it from the actual mouths of the witnesses, the testimony as it was produced at the previous trial."

The court fully instructed the jury, consistent with the language of § 413 as to the burden of proving the existence of aggravating and mitigating circumstances, as well as the consequences of the jury's determination. Following extended closing arguments of counsel, the jury found the existence of the two aggravating circumstances relied upon by the State: (1) that the victim was a law enforcement officer who was murdered in the performance of his duties, and (2) that the defendant committed the murder in furtherance of an escape from or an attempt to escape from or evade lawful custody by a law enforcement officer. The jury found three mitigating circumstances to exist: (1) that the defendant had not previously been convicted of a crime of violence, (2) that the defendant acted under substantial duress, domination or provocation of another person, but not so substantial as to constitute a complete defense to the prosecution, and (3) that it is unlikely that the defendant will engage in further criminal activity that would constitute a continuing threat to society. The jury found that it was not proven by a preponderance of the evidence that the mitigating circumstances outweighed the aggravating circumstances and accordingly, pursuant to § 413 (h) (2), the jury sentenced Tichnell to death.

(3)

Tichnell contends on appeal that the action of the trial court in admitting the transcript of the criminal trial over his objection violated § 413 (c), which limits the "type of evidence" admissible at a capital sentencing hearing. Addi-

tionally, he claims that the admission of the transcript at the sentencing hearing denied him the right of confrontation and cross-examination in violation of the Sixth Amendment to the federal constitution.[3] He also argues that the sentencing proceeding was a critical stage of the trial proceedings at which due process and fair trial principles apply. The key issue at the sentencing hearing, it is argued, concerned whether there was proof beyond a reasonable doubt that Tichnell was escaping or attempting to escape from or evade lawful custody when the deputy was shot and killed. Tichnell urges that the use of prior recorded trial testimony as a means to prove this statutory aggravating circumstance offended his confrontation and due process rights because it was not shown that the witnesses were unavailable to testify at the sentencing hearing. Moreover, Tichnell suggests that the trial judge was erroneous in his belief, as expressed in his instructions to the jury, that it was the court's responsibility to produce before the jury "the actual testimony as it was given" at the trial.

The State contends that it was within the discretion of the trial judge to restrict the prosecution to the presentation of evidence through reading of portions of the earlier transcribed testimony. While the State agrees that Tichnell was entitled to due process at his capital sentencing hearing, and that it would have been preferable had the prosecutor been permitted to present live testimony from all who testified at the original trial, nevertheless it maintains that Tichnell was not denied any statutory or constitutional rights by the procedure utilized by the trial judge.

According to the State, § 413 contemplates that the capital sentencing proceeding will ordinarily be conducted before the same jury that determined the defendant's guilt, and would therefore have before it all the evidence presented in the case. In such circumstances, the purpose of the separate sentencing hearing would be to provide an opportunity to present additional evidence as to the existence of

3. "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . ."

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aggravating and/or mitigating circumstances. But where, as here, the sentencing tribunal has not heard the evidence proving the commission of the murder, the State points to the need for some mechanism for providing information about the crime itself. In the present case, the State contends that it was the purpose of reading the transcript of the prior trial to acquaint the jury with the circumstances of the offense so that, with whatever additional evidence was available, the jury could properly determine whether the sentence would be death or life imprisonment.

The State argues that the prior recorded trial testimony read to the jury had been given under oath, with Tichnell present to confront and cross-examine the witnesses against him. Most of the witnesses who testified for the State, it is suggested, described objective observations about which there was little dispute. It is therefore argued that this is not a case, like *Gardner v. Florida*, 430 U.S. 349, 97 S. Ct. 1197, 51 L. Ed. 2d 393 (1977), upon which Tichnell places reliance, where a death sentence was vacated because it was based in part on information contained in a presentence report not revealed to the defendant or his counsel, and which the defendant had no opportunity to deny or rebut. Tichnell's right of confrontation was satisfied, the State urges, despite the fact that the prior recorded testimony was used at the sentencing hearing, because he was present at the sentencing hearing and had ample opportunity to refute or explain the evidence as it was there presented. The State argues that under *Ohio v. Roberts*, 448 U.S. 56, 100 S. Ct. 2531, 65 L. Ed. 2d 597 (1980), a showing of unavailability of the witnesses is not required where confrontation would serve no useful purpose. Because confrontation of live witnesses at the sentencing hearing would not have served a useful purpose in this case, the State concludes that the reading of the prior testimony of Tichnell's criminal trial fully satisfied his due process rights.

(4)

We said in *Crawford v. State*, 282 Md. 210, 383 A.2d 1097 (1978), with full citation to controlling Supreme Court deci-

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sions, and to our own cases, that the Sixth Amendment right of an accused in a criminal case to confront the witnesses against him is a fundamental constitutional right made obligatory on the states by the Fourteenth Amendment to the federal constitution.[4] We said, citing *State v. Collins*, 265 Md. 70, 288 A.2d 163 (1972), that the same right is secured by Article 21 of the Maryland Declaration of Rights. We noted that the primary interest secured by the confrontation clause is the right of cross-examination and that an adequate opportunity for cross-examination at the earlier proceeding may satisfy the clause in the absence of physical confrontation at the later proceeding. However, for the testimony taken in the former proceeding to be admissible at a subsequent proceeding, we said that both the state and federal constitutions, as well as Maryland common law, ordinarily require proof that the witness whose prior testimony is to be used is unavailable to testify.

It is well recognized that the right to confront and cross-examine the witnesses against the accused insures the accuracy of the fact-finding process by testing the witnesses' credibility. *Davis v. Alaska*, 415 U.S. 308, 94 S. Ct. 1105, 39 L. Ed. 2d 347 (1974); *California v. Green*, 399 U.S. 149, 90 S. Ct. 1930, 26 L. Ed. 2d 489 (1970); *Barber v. Page*, 390 U.S. 719, 88 S. Ct. 1318, 20 L. Ed. 2d 255 (1968). *Ohio v. Roberts*, *supra*, upon which the State places reliance — we think erroneously — involved the use of the prior recorded preliminary hearing testimony of a witness at the subsequent criminal trial. The accused objected on the ground that such use violated the confrontation clause of the Sixth Amendment. The Supreme Court there said, referring to or quoting from earlier of its decisions, that the clause reflects a preference for face-to-face confrontation at trial; that the primary interest secured by the clause is the right of cross-examination; that it is the literal right to "confront" the witness at trial that forms the core of the values furthered by the confrontation clause; and that the clause envisions a

4. *See* Dutton v. Evans, 400 U.S. 74, 91 S. Ct. 210, 27 L. Ed. 2d 213 (1970); Pointer v. Texas, 380 U.S. 400, 85 S. Ct. 1065, 13 L. Ed. 2d 923 (1965).

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personal examination and cross-examination of the witness, in which the accused has an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that the jurors may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief. The Court said that these means of testing the accuracy of the witness' testimony are so important that the absence of proper confrontation at trial calls into question the ultimate integrity of the fact-finding process. The Court pointed out that, by necessity, former recorded testimony was admissible at a subsequent trial as long as cross-examination was permitted at the earlier hearing, and it was shown that the witness whose prior testimony was introduced was not available to testify at the later proceeding. The Court said that the confrontation clause "normally requires a showing that [the witness] is unavailable" and, even then, his testimony is admissible only if it bears adequate "'indicia of reliability.'" 100 S. Ct. at 2539.

Whether these principles apply to the use of prior recorded trial testimony at a sentencing hearing under Maryland's capital sentencing statute is the nub of the issue before us. In this connection, it is undisputed that the prosecution witnesses who testified at Tichnell's trial were available to testify at the sentencing hearing.

The Supreme Court has considered the application of the confrontation and due process clauses to criminal sentencing hearings in a number of cases. *Williams v. New York*, 337 U.S. 241, 69 S. Ct. 1079, 93 L. Ed. 1337 (1949), involved a first degree murder conviction by a jury which recommended a sentence of life imprisonment. After receiving a presentence report and conducting a separate sentencing hearing, the trial judge imposed the death sentence. Although the petitioner did not challenge the accuracy of the judge's findings or seek an opportunity to rebut them, he contended on appeal that he had been denied due process because he was unable to cross-examine the authors of the

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presentence report. The Supreme Court discussed the need for the sentencing judge to possess the "fullest information possible concerning the defendant's life and characteristics" so that the sentence would fit the offender and not just the crime and contrasted this purpose with the protective purposes of the rules of evidence in criminal trials. *Id.* at 247. After concluding that much of the information contained in the presentence report would be unavailable to the sentencing authority if it was restricted to information produced in open court by testifying witnesses subject to cross-examination, the Court said:

> "[W]e do not think the Federal Constitution restricts the view of the sentencing judge to the information received in open court. The due-process clause should not be treated as a device for freezing the evidential procedure of sentencing in the mold of trial procedure. So to treat the due-process clause would hinder if not preclude all courts — state and federal — from making progressive efforts to improve the administration of criminal justice." *Id.* at 251.

In *Williams v. Oklahoma*, 358 U.S. 576, 79 S. Ct. 421, 3 L. Ed. 2d 516 (1959), the petitioner pled guilty to kidnapping and did not request a separate, formal sentencing hearing. He was sentenced to death after the prosecutor read a statement of facts to the court concerning the various crimes committed by the petitioner and his past criminal record. Citing *Williams v. New York, supra*, the Supreme Court held that the reading of the statement of facts did not deprive the petitioner of his constitutional right of confrontation and cross-examination as it was permissible and consistent with the requirements of due process for the sentencing judge to use information gathered outside the courtroom to determine a proper sentence. *Id.* at 584.

In *Specht v. Patterson*, 386 U.S. 605, 87 S. Ct. 1209, 18 L. Ed. 2d 326 (1967), the petitioner was convicted of a sexual offense and on the same day, without notice or a hearing, was also sentenced to an indeterminate period under the

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Colorado Sex Offenders Act. The petitioner contended that he was denied due process because his right to confront and cross-examine adverse witnesses had been denied. Although the Supreme Court stated its continued adherence to *Williams v. New York, supra*, it declined to extend the principles of that case to "this radically different situation" because after the petitioner received his initial conviction, he was also sentenced under another proceeding which involved a new finding of fact. *Id.* at 608. In these circumstances, the Court held that due process required that the petitioner have an opportunity to confront and cross-examine the witnesses against him.

In *Gardner v. Florida*, 430 U.S. 349, 97 S. Ct. 1197, 51 L. Ed. 2d 393 (1977), the petitioner was convicted of first degree murder and was sentenced to death after a separate sentencing hearing. He contended that he had been denied due process because neither he nor his attorney was given access to part of the presentence report. The Supreme Court, in a plurality opinion, stated that the holding of *Williams v. New York* was not applicable because in that case the sentencing judge related the material facts on the record and the petitioner failed to challenge them, and because the Court now recognized the uniqueness of the death penalty as punishment, *id.* at 356-57. It held that because the sentencing process must also satisfy the requirements of the due process clause, the petitioner's right to that constitutional guarantee was denied when his death sentence was based in part upon information which he had no opportunity to rebut.

Although *Gardner* required that sentencing hearings conform to due process standards, the Court noted that "[t]he fact that due process applies does not, of course, implicate the entire panoply of criminal trial procedural rights." *Id.* at 358. The case indicates that if a presentence report is fully disclosed and opportunity is given the defendant to explain or rebut it, its use during a capital sentencing proceeding would not constitute an abuse of due process. Thus, it appears that *Gardner* did not overrule the holding in *Williams* that the constitutional right of confrontation does

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not proscribe the use of presentence reports in capital sentencing proceedings.

Nothing in *Williams* or its progeny governs whether, in the circumstances of the present case, Tichnell was denied his right of confrontation or due process by reason of the introduction of the prior recorded trial testimony. As already indicated, the Maryland capital sentencing statute requires a bifurcated proceeding: (1) the trial to determine the accused's guilt of the offense charged and (2) a separate sentencing hearing, if the accused is found guilty, to determine whether the penalty should be life imprisonment or death. The sentencing phase of the proceeding involves (1) a determination by the sentencing authority of whether the aggravating circumstances relied upon by the State to justify imposition of the death sentence have been established by the evidence beyond a reasonable doubt and (2) a determination of whether mitigating circumstances upon which the defendant has placed reliance have been established by a preponderance of the evidence. Thus, the issue for determination is different in each proceeding, although manifestly a by-product of the evidence adduced at the trial will reveal, to some extent at least, the existence or absence of aggravating and/or mitigating circumstances. The ultimate issue to be decided by the sentencing authority, where both aggravating and mitigating circumstances are shown to exist, is whether, by a preponderance of the evidence, the mitigating circumstances outweigh the aggravating circumstances; if they do not, the death penalty must be imposed.

The "type of evidence" adducible at the sentencing hearing, as outlined in § 413 (c), includes, in addition to evidence pertaining to mitigating and aggravating circumstances, and the presentence report, "other evidence" deemed by the court to be "of probative value and relevant to sentence, provided the defendant is accorded a fair opportunity to rebut any statements."

In the usual case in which the prosecutor seeks the death penalty and obtains a qualifying first degree murder conviction, the trial judge and jury which heard the evidence at

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trial will also be involved in the subsequent sentencing proceeding; therefore, they will be full conversant with the evidence introduced prior to the commencement of the sentencing hearing. However, where an accused elects a court trial, but after conviction elects to be sentenced by a jury, as authorized by § 413 (b) (2) (ii), the sentencing jury will have no prior knowledge of the evidence produced at the trial. The same situation prevails where, as here, the original death sentence was vacated on appeal and a new jury is impaneled to hear the evidence at the sentencing phase of the proceeding.

The trial judge apparently believed that it was essential that the transcript of the prior trial testimony be introduced in evidence so that the sentencing jury would have before it the identical testimony that was produced before the fact finder at the guilt stage of the proceeding. He thus declined in the first instance to permit the State to discharge its burden of proving the existence of aggravating circumstances through the testimony of the same witnesses who testified at the trial even though, as the State candidly admitted at oral argument before us, it wanted to produce live witnesses at the sentencing hearing to enhance its chances of convincing the jury beyond a reasonable doubt that aggravating circumstances existed which were of such gravity as would justify imposition of the death penalty. The trial judge later indicated that the State could "expand" on the prior recorded testimony previously introduced in evidence before the sentencing jury; that Tichnell could object on relevancy grounds to any of the State's evidence as introduced through a reading of the trial transcript, or could otherwise rebut it; and that Tichnell could also produce evidence to show the existence of mitigating circumstances. Tichnell's objection to the procedure mandated by the trial judge was based, in part, upon his argument that the evidence pertaining to the existence of aggravating and/or mitigating circumstances involved witness credibility and demeanor and therefore the jury had to consider live testimony, subject to cross-examination, rather than the sterile reading of the trial transcript.

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To persuade the jury to impose a life rather than a death sentence, Tichnell wanted to convince it that the mitigating circumstances outweighed the aggravating circumstances. The heart of Tichnell's case before the sentencing jury was that he shot Deputy Livengood in self-defense at point-blank range as the two men struggled at the open door of Tichnell's car. The State's theory of the case was that Tichnell, to avoid apprehension, ambushed the deputy and shot him in the back — not in a face-to-face confrontation at the door of the car — but from a distance greater than three feet, as evidenced by the fact that no powder burns were found on the clothing of either Tichnell or Livengood. The trial testimony of the State's witness, Wolfe, if believed by the sentencing jury, was, for example, wholly inconsistent with Tichnell's version of the shooting.[5] Five spent shells found in close proximity to the deputy's body constituted evidence that he had been shot at some distance from where Tichnell's car was located. Other evidence adduced by the State, through the testimony of its witnesses at trial, permitted a jury to rationally find that the shooting could not have occurred as Tichnell said it did. *See Tichnell v. State*, 287 Md. at 700-09 and 719-20. Had Tichnell been believed on the other hand, the jury would not have found him guilty of premeditated first degree murder. Witness credibility was therefore of extreme importance, both at the trial and at the sentencing hearing.

The practical burden which Tichnell faced was to demonstrate to the sentencing jury, during presentation of the State's case on aggravating circumstances, that the shooting did not occur, as the prosecution claimed, in furtherance of an escape or attempt to evade or escape from lawful custody. It was of vital importance to Tichnell that he entirely negate that critical aggravating circumstance, or otherwise lessen its gravity, or obtain some corroboration of his own testimony, and hence favorably affect the weight which the jury would give to the aggravating circumstance in the ultimate

5. Wolfe's house overlooked the scene of the shooting. At trial, he testified to hearing a burst of gunfire, followed almost immediately by the sound of spinning wheels and a simultaneous volley of additional shots.

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weighing process. Tichnell's ability to do so mainly depended on an opportunity to cross-examine the State's witnesses and to thereby convince the sentencing jury that the testimony of those witnesses was not credible. Manifestly, this probing of the strength of the State's case on aggravating circumstances could not be achieved absent testimony from live prosecution witnesses. Moreover, Tichnell's need in the first instance to cross-examine the State's witnesses in an effort to weaken the strength of the prosecution's case bore importantly on his own testimony as to mitigating circumstances and, in particular, under § 413 (g)(3), whether in killing the deputy he acted "under substantial duress, domination or provocation of another person, but not so substantial as to constitute a complete defense to the prosecution." In the overall, the demeanor and credibility of the State's witnesses, as well as his own, was of critical importance to the sentencing jury in determining whether aggravating circumstances existed and, if so, whether the mitigating circumstances outweighed the aggravating circumstances. Indeed, it was a matter of life or death, of the gravest import, not just to Tichnell but to society itself.

Our research discloses no case like that now before us, challenging the admission in evidence of prior recorded trial testimony to sustain the State's burden of demonstrating the existence of aggravating circumstances, at a separate sentencing hearing, under a capital sentencing statute. Of some significance, however, is *Brady v. State*, 226 Md. 422, 174 A.2d 167 (1961), a case in which Brady and a confederate, Boblit, had committed a murder in the course of a robbery. Brady was found guilty by a jury of first degree murder; under a then existing statute, the jury could have, but did not, add to its guilty verdict the words "without capital punishment." Had it done so, the sentencing judge could not have imposed the death penalty. After the trial judge sentenced Brady to death, Brady filed a post conviction petition claiming that at his trial the State withheld evidence from the jury that Boblit confessed that it was he, and not Brady, that had actually murdered the victim. We concluded that the withholding of Boblit's confession from

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the jury prejudiced Brady but only as to the sentence imposed upon him. We said that if Bobit's withheld confession had been before the jury, nothing in it could have reduced Brady's offense below murder in the first degree and consequently there was no reason to retry that issue. We said (226 Md. at 430):

> "Brady is entitled to have a jury empaneled to determine whether the finding already made of guilty of murder in the first degree should or should not be modified by the addition of the words 'without capital punishment'; and to that end any admissible evidence bearing on that question should be submitted to the jury which either the State or the defendant may deem it appropriate to present. *This may require to a large extent a duplication of the evidence submitted at the first trial* . . . ." (Emphasis supplied.)

The emphasized language tends to indicate that the Court contemplated that the witnesses at trial would be required to testify at the sentencing hearing before the new jury, at least absent a showing of unavailability.

Absent agreement of the parties, or a showing of unavailability of the witnesses to testify at the separate sentencing hearing, we conclude that § 413 (c) does not permit, over timely objection, the admission in evidence before a new sentencing jury of the prior recorded trial testimony to prove the existence or absence of aggravating or mitigating circumstances. That the State's witnesses were available and desired to testify before the sentencing jury is conceded by the State; therefore, the lower court erred in admitting the challenged evidence and a new sentencing hearing is necessary. On remand, the trial judge should permit the State to produce whatever relevant and admissible evidence it may wish to present to the sentencing jury through the testimony of its witnesses. Manifestly, there is

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no requirement that this evidence be a carbon copy of that presented at the guilt stage of the bifurcated proceeding.[6]

Tichnell raised six other objections to the imposition of the death sentence in this case. Three were raised and found without merit in *Tichnell v. State, supra*. Another claimed that the second sentencing hearing constituted double jeopardy. Still another claimed a deprivation of the right to counsel. There was also a contention of prejudice by adverse newspaper publicity on the morning of the commencement of the second hearing. None of the contentions is supported by serious argument, and all are without merit.

Death sentence vacated; case remanded for a new sentencing proceeding under § 413 of Article 27; costs to be paid by the County Commissioners of Garrett County.

Judge Davidson concurs in the result.

6. Without discussion as to the effect of the confrontation clause on the use of prior recorded testimony, the Virginia Supreme Court, in three cases, has summarily approved the introduction of trial transcripts at capital sentencing hearings. *See* Fogg v. Commonwealth, 215 Va. 164, 207 S.E.2d 847 (1974); Huggins v. Commonwealth, 213 Va. 327, 191 S.E.2d 734 (1972); Snider v. Cox, 212 Va. 13, 181 S.E.2d 617 (1971).

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Misc. No.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

RICHARD DANNY TICHNELL

and

JAMES ARTHUR CALHOUN,

Petitioners

v.

STATE OF MARYLAND,

Respondent

APPENDIX TO PETITION FOR

WRIT OF CERTIORARI

APPENDIX C

Opinion of the Court of Appeals of Maryland in Tichnell v. State, 297 Md. 432, ___ A.2d ___ (1983), filed on November 3, 1983 ..... C.1

RICHARD DANNY TICHNELL v. STATE OF MARYLAND

[No. 3, September Term, 1982.]

Decided November 3, 1983

CONSTITUTIONAL LAW — CRIMINAL LAW — *Jury Selection — Accused Has Right To Impartial Jury — Jury Selection Process Must Satisfy Essential Demands Of Due Process Under Fourteenth Amendment — Voir Dire Examination Of Prospective Jurors Protects Due Process Rights By Exposing Existence Of Grounds For Disqualification.* pp. 436-438

CONSTITUTIONAL LAW — CRIMINAL LAW — *Voir Dire Examination — Maryland Rule 752 Affords Due Process In Examination Of Prospective Jurors.* pp. 436-438

TRIALS — *Voir Dire Examination — Counsel Has No Absolute Right To Conduct Individual Voir Dire Examination Of Prospective Jurors — Matter Is Committed To Sound Discretion Of Trial Judge — Trial Judge Did Not Abuse Discretion In Conducting Voir Dire Examination In Accordance With Maryland Rule 752.* Where trial court denied defense counsel's request to individually question prospective jurors on voir dire, but where trial court asked all voir dire questions submitted by defense counsel, the Court *held* there was no error, constitutional or otherwise, with respect to the trial court's conduct of the voir dire examination. Maryland Rule 752. p. 438

CRIMINAL LAW — MURDER — *Death Sentence — State Must Notify Defendant In Writing At Least 30 Days Prior To Trial That It Intends To Seek Death Sentence — No Additional Notice Is Required Before Sentencing Or Resentencing Proceeding — Code (1957, 1982 Repl. Vol.) Art. 27, § 412 (b).* Where defendant in first degree murder case received requisite notice before trial, pursuant to Code (1957, 1982 Repl. Vol.) Art. 27, § 412 (b), that State intended to seek a sentence of death, the Court *held* that no further statutory notice under § 412 (b) was required prior to defendant's sentencing proceeding or prior to resentencing proceedings following appeals. p. 439

CONSTITUTIONAL LAW — CRIMINAL LAW — DOUBLE JEOPARDY — *Doctrine Of "Judicial Overreaching" May Bar Retrial — Doctrine Applies Where Court Engages In Misconduct With Intent To Provoke Defendant's Motion For Mistrial — Doctrine Of "Judicial Overreaching" Is Not Applicable To Instant Case.* Where defendant's second capital sentencing proceeding, in which death sentence was imposed, was reversed on appeal because the trial judge erroneously required the transcript of defendant's original trial to be introduced in evidence, the Court *held* that this error did not call into

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play the doctrine of "judicial overreaching" and did not bar, on double jeopardy grounds, a third capital sentencing proceeding against the defendant. pp. 439-441

CRIMINAL LAW — MURDER — *Death Sentence — Provisions Of Maryland's Capital Sentencing Statute Reviewed — Code (1957, 1982 Repl. Vol.) Art. 27, §§ 412-414; Maryland Rule 772A.* pp. 441-446

CRIMINAL LAW — *Capital Cases — Death Sentence — Constitutional Requirements Of Death Penalty Statutes Reviewed — Constitutionality Of Maryland Capital Sentencing Statute Reaffirmed — Code (1957, 1982 Repl. Vol.) Art. 27, §§ 412-414.* pp. 447-449

CRIMINAL LAW — *Death Sentence — Review By Court Of Appeals — Statute Mandates Review Of Record By Court Of Appeals To Determine If Death Penalty Was: (1) Imposed Under Influence Of Arbitrary Factor; (2) Whether Evidence Supports Finding Of Statutory "Aggravating Circumstance"; (3) Whether Evidence Supports Finding That Aggravating Circumstances Were Not Outweighed By Mitigating Circumstances; And (4) Whether Death Sentence Was Excessive Or Disproportionate To Penalty Imposed In Similar Cases — Code (1957, 1982 Repl. Vol.) Art. 27, § 414 (e).* pp. 449-450

CRIMINAL LAW — *Death Sentence — Review By Court Of Appeals — In Instant Case, Court Of Appeals Holds That Death Sentence Was Not Imposed Under Influence Of Arbitrary Factor, And That Evidence Supports Findings Of Two Statutory "Aggravating Circumstances", Which Were Not Outweighed By Single "Mitigating Circumstance" — Code (1957, 1982 Repl. Vol.) Art. 27, § 414 (e).* In the instant case, based upon its review of the record before the jury in a capital sentencing proceeding, the Court *held* that the death sentence was not imposed upon the defendant under the influence of passion, prejudice or any other arbitrary factor in violation of Code (1957, 1982 Repl. Vol.) Art. 27, § 414 (e)(1). The Court further *held* that the evidence supported the jury's finding of two "aggravating circumstances", *i.e.*, that the victim was a law enforcement officer who was murdered while performing his duties, and that the defendant committed the murder to further an escape or an attempt to avoid lawful custody or arrest by a law enforcement officer. Code, Art. 27, § 414 (e)(2). The Court further *held* that these "aggravating circumstances" are not outweighed by the single mitigating circumstance that the defendant had not been convicted previously of a crime of violence. Code, Art. 27, §§ 413 (e)(3), 413 (g)(1). pp. 450-456

CRIMINAL LAW — *Capital Cases — Death Sentence — Review By Court Of Appeals — Proportionality Review — Court Of Appeals Will Review Only Those First Degree Murder Cases In Which State Sought Death Pen-*

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ality, Whether Or Not It Was Imposed — Code (1957, 1982 Repl. Vol.) Art. 27, § 414 (e)(4). Considering the purpose of proportionality review to identify and avoid "the aberrant sentence", the law of other jurisdictions with similar statutes, and the views of legal commentators, the Court *held* that the proportionality review required by Code (1957, 1982 Repl. Vol.) Art. 27, § 414 (e)(4) includes only those first degree murder cases in which the State sought the death penalty under § 413, whether or not it was imposed. pp. 457-465

CONSTITUTIONAL LAW — CRIMINAL LAW — *Capital Cases — Death Sentence — Review By Court Of Appeals — Proportionality Review — Limiting Proportionality Review To Only Those Cases In Which Death Penalty Was Sought Does Not Violate Due Process Clause Or "Cruel And Unusual Punishment" Provision Of U. S. Constitution Or Maryland Constitution — Code (1957, 1982 Repl. Vol.) Art. 27, § 414 (e)(4).* pp. 465-466

CRIMINAL LAW — *Death Sentence — Review By Court Of Appeals — Proportionality Review — Defendant May Request, But Not Require, Court Of Appeals To Consider Non-Capital Murder Cases Which Are Similar To Case Under Scrutiny — Code (1957, 1982 Repl. Vol.) Art. 27, § 414 (e)(4).* Although holding that neither federal or state constitutions required the Court of Appeals to expand its "proportionality review" under Code (1957, 1982 Repl. Vol.) Art. 27, § 414 (e)(4) to nonappealed capital cases where a life sentence was imposed, homicide cases where a capital conviction was not obtained, or homicide cases where the defendant was convicted of a lesser offense, the Court stated that in its death sentence review proceeding, a defendant could request the Court to consider designated non-capital murder cases. pp. 465-466

CRIMINAL LAW — *Death Sentence — Review By Court Of Appeals — Proportionality Review — Court Will Review Similar Cases For Purpose Of Avoiding Arbitrary Or Capricious Imposition Of Death Penalty — Comparative Analysis Limited To Cases Decided Under Maryland Law And Under Constitutional Death Penalty Statutes — Code (1957, 1982 Repl. Vol.) Art. 27, § 414 (e)(4).* p. 466

CRIMINAL LAW — *Death Sentence — Review By Court Of Appeals — Fact That Murder Victim Was Police Officer Performing His Regular Duties May Be Regarded As An "Aggravating Factor" In Death Penalty Statutes — Death Sentence Affirmed In Instant Case.* p. 467

CRIMINAL LAW — *Death Sentence — Review By Court Of Appeals — Proportionality Review — Court Of Appeals Selects "Similar" Cases Based, In Part, On Trial Judge's Report Filed Pursuant To Maryland Rule 772A — Dissimilarities May Exist Between Instant Case And Cases Selected For*

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4321 Syllabus

Comparative Review — Isolated Decision Of Jury To Afford Mercy Does Not Render Unconstitutional Imposition Of Death Sentence Upon Defendant, So Long As Death Sentence Statute Does Not Create Substantial Risk Of Arbitrariness Or Caprice In Capital Sentencing Process — Death Sentence In Instant Case Held Neither Excessive Nor Disproportionate Under Code (1957, 1982 Repl. Vol.) Art. 27, § 414 (e). In conducting its "proportionality review" under Article 27, § 414 (e) (4), the Court reviewed the Rule 772A trial judge's reports in all 48 capital sentencing proceedings brought since enactment of Maryland's death penalty statute in 1978. Of these, the Court selected five which it deemed to be "similar" under § 414 (e) (4). Based upon a review of these five cases — only one of which resulted in a death sentence — the Court *held* that the death sentence imposed by a jury in the instant cases was neither excessive nor disproportionate under § 414 (e) (4), and the sentence was affirmed. pp. 466-473

J. A. A.

Review of Death Sentence (Maryland Rule 899) from the Circuit Court for Calvert County (BOWEN, J.).

Richard Danny Tichnell was found guilty by a jury of first degree murder, in a case in which the State sought imposition of the death penalty under Code (1957, 1982 Repl. Vol.) Art. 27, §§ 412-414. A death sentence, imposed by the trial court, was reversed by the Court and the case remanded for a new sentencing hearing. *Tichnell v. State*, 287 Md. 695, 415 A.2d 830 (1980). On remand, a jury imposed a death sentence, but on appeal, the Court remanded for a third capital sentencing hearing. *Tichnell v. State*, 290 Md. 43, 427 A.2d 991 (1981). From a jury sentence again imposing the death penalty, Tichnell appeals. This appeal was initially argued on October 6, 1982. This issue relating to proportionality review of the death penalty was argued on January 6, 1983.

Judgment affirmed, with costs.

The cause was argued before MURPHY, C. J., and SMITH, ELDRIDGE, COLE, DAVIDSON, RODOWSKY and COUCH, JJ.

Clark B. Frame, with whom was *Richard D. Poling* on the brief, for appellant.

Deborah K. Handel and *Stephanie J. Lane*, *Assistant Attorneys General*, with whom was *Stephen H. Sachs*, *Attorney General*, on the brief, for appellee.

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Supplemental argument on January 6, 1983. *Clark B. Frame* for appellant and *Deborah K. Handel, Assistant Attorney General*, for appellee.

MURPHY, C. J., delivered the opinion of the Court, in which ELDRIDGE and COLE, JJ., concur and DAVIDSON, J., dissents. ELDRIDGE, J., filed a concurring opinion at page 477 *infra*; COLE, J., filed a concurring opinion at page 482 *infra*; DAVIDSON, J., filed a dissenting opinion at page 485 *infra*.

On August 23, 1979, Richard Danny Tichnell was found guilty by a jury of the wilful, deliberate and premeditated first degree murder of Deputy Sheriff David Livengood. The State sought imposition of the death penalty under Maryland's capital punishment statute, Maryland Code (1957, 1982 Repl. Vol.), Article 27, §§ 412-414, inclusive. Tichnell waived his statutory right to have the jury determine whether the death penalty should be imposed upon him; he elected instead to have the trial judge decide the issue. The court sentenced him to death. On appeal, we affirmed the murder conviction but vacated the death sentence on the ground that it had been imposed under the influence of an "arbitrary factor" in violation of Art. 27, § 414 (e) (1). We remanded for a new sentencing hearing. *Tichnell v. State*, 287 Md. 695, 415 A.2d 830 (1980) (*Tichnell I*). Thereafter, Tichnell elected to have a jury determine whether the death penalty should be imposed upon him. The jury concluded that death was the appropriate penalty. On appeal, we again vacated the death sentence and remanded for a new sentencing hearing; we concluded that the trial judge had committed reversible error in admitting certain prior recorded trial testimony in evidence over Tichnell's objection. *Tichnell v. State*, 290 Md. 43, 427 A.2d 991 (1981) (*Tichnell II*). At his third capital sentencing hearing, Tichnell again elected to be sentenced by a jury. The jury imposed the death penalty and this appeal followed.

I

Tichnell contends that he was denied due process of law at his capital sentencing hearing because the court-conducted voir dire examination was too limited to expose bias on the

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part of the prospective jurors. He argues that the court erred in denying his motion to personally conduct the voir dire examination of the individual jurors. In support of this argument, Tichnell suggests that it was impossible "to prepare in advance appropriate voir dire examination questions, subject to acceptance or rejection by the trial court, until counsel had an opportunity to observe and ascertain the decorum and atmosphere in the courtroom, to hear the nature and reach of the trial court's voir dire examination and inquiries, and to get a view of the prospective jurors and note their attitude and silence or responses to the initial voir dire examination."

Maryland Rule 752 provides:

> "The court may permit the parties to conduct an examination of prospective jurors or may itself conduct the examination. If the court conducts the examination, it shall permit the parties to supplement the examination by any further inquiry it deems proper or shall itself submit to the prospective jurors the additional questions proposed by the parties it deems proper."

Consistent with the provisions of the rule, the trial judge (Bowen, J.) announced at the outset of the proceedings that he would conduct the voir dire questioning of prospective jurors and would permit Tichnell to submit additional questions to be propounded by the court to the jurors. The court thereafter asked a number of questions aimed at exposing juror bias or partiality. Tichnell submitted additional voir dire questions to the court, all of which the court asked the prospective jurors.

The jury selection process must, of course, satisfy the essential demands of fairness guaranteed by the fourteenth amendment in order to afford the accused his due process right to an impartial jury. *See Ristaino v. Ross*, 424 U.S. 589, 595 n. 6, 96 S. Ct. 1017, 47 L. Ed. 2d 258 (1976); *Ham v. South Carolina*, 409 U.S. 524, 93 S. Ct. 848, 35 L. Ed. 2d 46 (1973). The voir dire examination of prospective jurors protects this right by exposing the existence of grounds for

disqualification. *See Couser v. State*, 282 Md. 125, 383 A.2d 389, *cert. denied*, 439 U.S. 852 (1978); *Langley v. State*, 281 Md. 337, 378 A.2d 1338 (1977).

Maryland Rule 752 permits, but does not require, individual voir dire examination of prospective jurors by counsel. The matter is committed to the sound discretion of the trial judge; there is no absolute right vested in counsel, constitutional or otherwise, to conduct individual voir dire. *See, e.g., Langley v. State*, 281 Md. 337, 378 A.2d 1338 (1977); *Bryant v. State*, 207 Md. 565, 115 A.2d 502 (1955); *Handy v. State*, 101 Md. 39, 60 A. 452 (1905); *United States v. Duke*, 409 F.2d 669 (4th Cir. 1969), *cert. denied*, 397 U.S. 1062 (1970) (defendant has no constitutional right to counsel-conducted voir dire); *Turner v. Commonwealth*, 221 Va. 513, 273 S.E.2d 36 (1980) (no constitutional right to individual jury voir dire). *See also Irvin v. State*, 617 P.2d 588 (Okla. Crim. App. 1980).

Tichnell has not identified any specific deficiencies or particular shortcomings in the court's voir dire examination of the prospective jurors. Instead, he generalizes that the court's "attitude and disposition" during voir dire were antithetical to fair and impartial jury selection. He complains that the court's questioning of prospective jurors was so brief, stiff and short as to have left him "on a stormy sea without compass or rudder." Manifestly, these allegations are insufficient to demonstrate that the jury selection process failed to assure Tichnell of a fair and impartial jury. We conclude, therefore, that no error appears on the record in this case with respect to the trial judge's conduct of the voir dire examination in conformity with the dictates of Rule 752.[1] *See also Poole v. State*, 295 Md. 167, 453 A.2d 1218 (1983).

1. Tichnell has appended to his brief an affidavit of his mother, which was executed three months after the death sentence had been imposed on her son. The affidavit states that two jurors approached his mother during the course of the sentencing proceeding, questioned her as to the identity of her companions, and said the information would be helpful in making their decision. Tichnell suggests that this alleged incident has some bearing on his argument that the voir dire was ineffective, although from the discussion in his brief, its significance is unclear. In any event, the affidavit was never presented to the trial court; therefore, it is not before this Court for consideration. *See* Sturgis v. State, 235 Md. 343, 346, 201 A.2d 681, 682 (1964); Maryland Rule 885.

C.7

II

Tichnell contends that this third sentencing proceeding was null and void because the State failed to comply with the notice requirement of Art. 27, § 412 (b). That section provides, *inter alia*, that a person found guilty of first degree murder must be sentenced to life imprisonment unless

> "the State notified the person in writing at least 30 days prior to trial that it intended to seek a sentence of death, and advised the person of each aggravating circumstance upon which it intended to rely . . . ."

Tichnell timely received the requisite statutory notice before his original trial. He was advised that the State intended to prove the existence of two aggravating circumstances — that Livengood was a law enforcement officer killed in the performance of his duties and that the murder was committed in furtherance of an escape or an attempt to escape from or evade lawful arrest by a law enforcement officer. Section 412 (b) does not require that the State give additional notice before commencing the capital sentencing proceeding. Plainly, the word "trial," in the context of its usage in § 412 (b), does not encompass a resentencing proceeding.

III

Tichnell maintains that his third sentencing proceeding was barred by the Double Jeopardy Clause of the Fifth Amendment.[2] He contends that the trial court's conduct in the second capital sentencing proceeding constituted "judicial overreaching," which barred further resentencing because the trial judge "intentionally and deliberately directed and required the reading of prior recorded trial testimony to the jury."

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2. The provision is made applicable to the states through the Due Process Clause of the Fourteenth Amendment. Benton v. Maryland, 395 U.S. 784, 89 S. Ct. 2056, 23 L. Ed. 2d 707 (1969).

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"Judicial overreaching" is significant for purposes of double jeopardy when a mistrial is declared at the behest of the defendant. Generally, a defendant may be reprosecuted if the initial trial resulted in a mistrial on his motion. *United States v. Jorn*, 400 U.S. 470, 485, 91 S. Ct. 547, 557, 27 L. Ed. 2d 543, 556 (1971); *Jourdan v. State*, 275 Md. 495, 508, 341 A.2d 388, 396 (1975), the rationale being that the defendant has elected to terminate the "right to have his trial completed by a particular tribunal." *See Oregon v. Kennedy*, 456 U.S. 667, 672-74, 102 S. Ct. 2083, 2087-88, 72 L. Ed. 2d 416, 422-23 (1982). Where the court engaged in misconduct with the intent to provoke the defendant's motion for a mistrial, retrial could be barred by the double jeopardy clause. *Id.* at 679, 102 S. Ct. at 2091, 72 L. Ed. 2d at 427. As the Supreme Court recently explained:

> "In such a case, the defendant's valued right to complete his trial before the first jury would be a hollow shell if the inevitable motion for mistrial were held to prevent a later invocation of the bar of double jeopardy . . . ."
> *Id.* at 673, 102 S.Ct. at 2088, 72 L. Ed. 2d at 423.

When a defendant's trial is completed and his conviction later reversed on appeal, different rules pertain. With some exceptions, the defendant who successfully challenges his conviction may be retried, under the rationale that "the defendant wiped the slate clean and the parties may start anew." *Jones v. State*, 288 Md. 618, 625, 420 A.2d 1241, 1244 (1980), *cert. denied*, 449 U.S. 1115 (1981).

Tichnell's second capital sentencing proceeding did not end in a mistrial; rather, the proceeding was completed. While the sentence imposed was later vacated in *Tichnell II*, *supra*, 290 Md. 43, the trial court's conduct did not amount to judicial overreaching. Rather, the trial judge was simply mistaken in his belief that it was essential that the tran-

script of testimony in Tichnell's original trial be introduced in evidence so as to permit the sentencing jury to have before it the identical testimony that was produced before the factfinder at the guilt or innocence stage of the proceeding. Manifestly, the court's action was not intended to provoke Tichnell to move for a mistrial. We conclude that nothing in the bar of double jeopardy prevented a third capital sentencing proceeding in Tichnell's case. *See Tichnell, II, supra*, 290 Md. at 64.

IV

Tichnell next contends that the resentencing record in this case does not support the imposition of the death penalty. He argues that the evidence adduced at the resentencing hearing differs in material respects from that produced at his original trial; that it sustains his version of the killing of Deputy Livengood; and that the death sentence imposed upon him must therefore be vacated. Tichnell also maintains that the death sentence imposed upon him constitutes cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments to the Federal Constitution and Article 25 of the Maryland Declaration of Rights. This is particularly so, he claims, because he has been made to suffer through three capital sentencing hearings, each of which resulted in the imposition of a death sentence. Proper consideration of Tichnell's arguments necessitates that we review the pertinent provisions of the Maryland capital sentencing statute, the governing law, and the evidence underlying Tichnell's conviction and sentence.

(A)

Section 412 (b) of the Maryland statute provides that a person found guilty of murder in the first degree must be sentenced to life imprisonment unless the State (1) notifies the accused in writing at least 30 days prior to trial that it intends to seek the death penalty, (2) advises the accused of each "aggravating circumstance" upon which it intends to rely and (3) obtains the death penalty in accordance with the provisions of § 413 of the statute. Where the State complies with these prerequisites, and the accused is found guilty of murder in the first degree, § 413 (a) requires that a separate

sentencing hearing be held, either before a jury or before the court, if the defendant waives his right to a jury hearing. Section 413 (c) provides that the following type of evidence is admissible at the sentencing hearing:

> "(i) Evidence relating to any mitigating circumstance listed in subsection (g);
>
> (ii) Evidence relating to any aggravating circumstance listed in subsection (d) of which the State had notified the defendant pursuant to § 412 (b);
>
> (iii) Evidence of any prior criminal convictions, pleas of guilty or nolo contendere, or the absence of such prior convictions or pleas, to the same extent admissible in other sentencing procedures;
>
> (iv) Any presentence investigation report. However, any recommendation as to sentence contained in the report is not admissible; and
>
> (v) Any other evidence that the court deems of probative value and relevant to sentence, provided the defendant is accorded a fair opportunity to rebut any statements."

Under § 413 (d) of the statute, the sentencing authority, either judge or jury, is first enjoined to consider whether, beyond a reasonable doubt, any of ten statutorily delineated aggravating circumstances exist.[3] If the sentencing author-

3. The aggravating circumstances are:

> "(1) The victim was a law enforcement officer who was murdered while in the performance of his duties.
>
> (2) The defendant committed the murder at a time when he was confined in any correctional institution.
>
> (3) The defendant committed the murder in furtherance of an escape or an attempt to escape from or evade the lawful custody, arrest, or detention of or by an officer or guard of a correctional institution or by a law enforcement officer.
>
> (4) The victim was a hostage taken or attempted to be taken in the course of a kidnapping or abduction or an attempt to kidnap or abduct.
>
> (5) The victim was a child abducted in violation of § 2 of this article.
>
> (6) The defendant committed the murder pursuant to an agreement or contract for remuneration or the promise of remuneration to commit the murder.

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ity does not find, beyond a reasonable doubt, the existence of one or more of the aggravating circumstances, the sentence must be life imprisonment. § 413 (f). If, however, the sentencing authority finds beyond a reasonable doubt the existence of one or more aggravating factors, then it must determine whether, by a preponderance of the evidence, any of eight "mitigating circumstances" exist. § 413 (g).[4] The

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(7) The defendant engaged or employed another person to commit the murder and the murder was committed pursuant to an agreement or contract for remuneration or the promise of remuneration.

(8) At the time of the murder, the defendant was under sentence of death or imprisonment for life.

(9) The defendant committed more than one offense of murder in the first degree arising out of the same incident.

(10) The defendant committed the murder while committing or attempting to commit robbery, arson, or rape or sexual offense in the first degree."

4. The mitigating circumstances are:

"(1) The defendant has not previously (i) been found guilty of a crime of violence; (ii) entered a plea of guilty or nolo contendere to a charge of a crime of violence; or (iii) had a judgment of probation on stay of entry of judgment entered on a charge of a crime of violence. As used in this paragraph, 'crime of violence' means abduction, arson, escape, kidnapping, manslaughter, except involuntary manslaughter, mayhem, murder, robbery, or rape or sexual offense in the first or second degree, or an attempt to commit any of these offenses, or the use of a handgun in the commission of a felony or another crime of violence.

(2) The victim was a participant in the defendant's conduct or consented to the act which caused the victim's death.

(3) The defendant acted under substantial duress, domination or provocation of another person, but not so substantial as to constitute a complete defense to the prosecution.

(4) The murder was committed while the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired as a result of mental incapacity, mental disorder, emotional disturbance, or intoxication.

(5) The youthful age of the defendant at the time of the crime.

(6) The act of the defendant was not the sole proximate cause of the victim's death.

(7) It is unlikely that the defendant will engage in further criminal activity that would constitute a continuing threat to society.

(8) Any other facts which the jury or the court specifically sets forth in writing that it finds as mitigating circumstances in the case."

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statute requires that a sentence of life imprisonment be imposed if, by a preponderance of the evidence, the sentencing authority finds that the mitigating circumstances outweigh the aggravating circumstances. § 413 (h) (1) and (3). If the sentencing authority concludes that the mitigating circumstances do not outweigh the aggravating circumstances by a preponderance of the evidence, a sentence of death must be imposed. § 413 (h) (2).[5]

At the conclusion of the evidence at the sentencing hearing, the trial judge is required by § 413 (c) (3) to instruct the jury "as to the findings it must make in order to determine whether the sentence shall be death or imprisonment for life and the burden of proof applicable to these findings" in accordance with the governing provisions of § 413.

Section 413 (i) requires that the determination of the sentencing authority must be in writing and, if a jury, be unanimous and signed by the foreman. Section 413 (j) requires the sentencing authority to specify:

> "(1) Which, if any, aggravating circumstances it finds to exist;
>
> (2) Which, if any, mitigating circumstances it finds to exist;
>
> (3) Whether any mitigating circumstances found under subsection (g) outweigh the aggravating circumstances found under subsection (d);
>
> (4) Whether the aggravating circumstances found under subsection (d) are not outweighed by mitigating circumstances under subsection (g); and

5. Section 413 (e) (1) of the statute makes clear that only a principal in the first degree is subject to the death penalty, except where the aggravating circumstance charged is that outlined in § 413 (d) (7). A principal in the first degree "is one who actually commits a crime, either by his own hand, or by an inanimate agency or by an innocent human agent." State v. Ward, 284 Md. 189, 197, 396 A.2d 1041 (1978).

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(5) The sentence, determined in accordance with subsection (f) or (h)."

Section 413 (k) requires that the court impose the sentence determined by the jury under § 413 (f) or (h); it further specifies that the court dismiss the jury and impose a sentence of life imprisonment if the jury, within a reasonable time, is unable to agree as to the sentence to be imposed. Section 413 (l) authorizes this Court to adopt rules of procedure to govern the conduct of the capital sentencing proceeding, including any forms to be used by the sentencing authority in making its written findings and determination of sentence.

Section 414 entitled "Automatic review of death sentences" requires in subsection (e) that this Court review the imposition of the death penalty on the record before the sentencing authority in order to determine:

"(1) Whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor;

(2) Whether the evidence supports the jury's or court's finding of a statutory aggravating circumstance under § 413 (d);

(3) Whether the evidence supports the jury's or court's finding that the aggravating circumstances are not outweighed by mitigating circumstances; and

(4) Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant."

With respect to the "similar cases" proportionality review provision of § 414 (e) (4), § 414 (f) (2) requires that this Court "include in its decision a reference to the similar cases which it considered."

Section 414 (f) mandates that this Court either (1) affirm the death sentence, (2) set it aside and remand for a new

sentencing proceeding, or (3) "[s]et aside the sentence and remand for a modification of the sentence to imprisonment for life."

Maryland Rule 772A, adopted by this Court pursuant to § 413 (l) of the statute, prescribes a verdict form for use by the sentencing authority in making its findings and determination. The form tracks the pertinent statutory language of § 413 and directs the sentencing authority to specify, by "yes" or "no" answer, whether the aggravating and or mitigating circumstances were established by the evidence.[6] The verdict form guides the sentencing authority in its final determination of sentence within the formulation of § 413 of the statute. The rule requires that the verdict form be signed by each juror. It requires in subparagraph f that the trial judge complete a report, the detailed content of which the rule prescribes. The report calls for pertinent information pertaining to the accused and the crime, and requires the trial judge to describe the "facts of offense" and state his opinion as to whether the death sentence was justified.[7] The rule requires that the trial judge send his report to counsel for the parties for comment as to its factual accuracy. Counsel's comments are required to be attached to the trial judge's report; the report must be promptly filed "with the clerk of the trial court, and in the case of a life sentence with the Clerk of the Court of Appeals."[8]

6. The verdict form provides space permitting the sentencing authority to state, in writing, any other mitigating circumstances which it may find in addition to the specifically listed mitigating circumstances outlined in § 413 (g).

7. Section 414 (b) of the statute requires that the clerk of the trial court, in transmitting the record of the capital sentencing hearing, include the report of the trial judge, which is to contain "a recommendation by the trial court as to whether or not imposition of the sentence of death is justified in the case."

8. The "Committee note" appended to Rule 772A states that "[i]n the case of a life sentence the report of the judge is filed with the Clerk of the Court of Appeals only for informational purposes to permit that Court to make the determination in other cases required by Code, Article 27, § 414 (e) (4), *i.e.*, the proportionality review provision of the statute.

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(B)

In *Tichnell I, supra*, 287 Md. at 729, we held that Maryland's capital sentencing statute, enacted in 1978, "on its face, . . . satisfies the requirements of the Eighth and Fourteenth Amendments to the federal constitution, and Art. 25 of the Maryland Declaration of Rights." We so concluded after reviewing a number of Supreme Court cases concerning the constitutionality of death penalty statutes, beginning with *Furman v. Georgia*, 408 U.S. 238, 92 S. Ct. 2726, 33 L. Ed. 2d 346 (1972), and including *Gregg v. Georgia*, 428 U.S. 153, 96 S. Ct. 2909, 49 L. Ed. 2d 859 (1976); *Proffitt v. Florida*, 428 U.S. 242, 96 S. Ct. 2960, 49 L. Ed. 2d 913 (1976); and *Jurek v. Texas*, 428 U.S. 262, 96 S. Ct. 2950, 49 L. Ed. 2d 929 (1976). We noted the holding in *Furman*, namely, that death sentences administered under statutes which vested trial courts of general jurisdiction with the discretion to sentence a person convicted of first degree murder to either life or death violated the Eighth and Fourteenth Amendments to the Federal Constitution. We further noted that some states, including Maryland, initially misread the holding in *Furman* to require that a death penalty statute, to be constitutional, had to automatically require imposition of the death penalty upon conviction of a specifically defined and narrowly drawn class of first degree murder. We also noted that in *Woodson v. North Carolina*, 428 U.S. 280, 96 S. Ct. 2978, 49 L. Ed. 2d 944 (1976), the Supreme Court held that mandatory death penalty statutes were unconstitutional for failure to require the sentencing authority to consider the character and record of the individual offender and the circumstances of the particular offense. *Woodson* declared that mandatory death penalty statutes impermissibly vested standardless sentencing discretion in juries. 428 U.S. at 302-03.

We observed in *Tichnell I* that in *Gregg*, *Proffitt* and *Jurek*, the Supreme Court upheld the death penalty statutes, respectively, of Georgia, Florida and Texas, all of which involved the constitutionality of so-called "guided discretion" death penalty statutes. In *Gregg*, the Court's

plurality opinion upheld the constitutionality of such statutes against Eighth and Fourteenth Amendment attack. The Court there construed *Furman* as holding that the death penalty could not be imposed under sentencing procedures that created a substantial risk that the penalty would be inflicted in an arbitrary and capricious manner; it said:

> "*Furman* mandates that where discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action." 428 U.S. at 188.

We further noted in *Tichnell I, supra*, 287 Md. at 723, that the death penalty statutes upheld in *Gregg, Proffitt* and *Jurek* each contained three provisions which guarded against the concerns raised in *Furman*. First, each of the new discretionary statutes provided for a bifurcated trial so that guilt and punishment would be separately determined. Second, imposition of the death penalty was restricted to cases in which certain aggravating circumstances were established. The sentencing authority was also required to consider the existence of mitigating circumstances. The Court stated in *Jurek*, 428 U.S. at 274, that this type of provision

> "guides and focuses the [sentencing authority's] objective consideration of the particularized circumstances of the individual offense and the individual offender before it can impose a sentence of death."

Finally, the statutes that were upheld provided for expedited appellate review of the death penalty statute as a check against the random or arbitrary imposition of the death penalty.

The Maryland statute complies with the three general methods of guiding the discretion vested in the sentencing authority, as required by the Supreme Court cases. We said in *Tichnell I, supra*, 287 Md. at 728-29:

> "The [Maryland] statute provides a bifurcated trial procedure, and the imposition of the death penalty is limited to cases in which the sentencing authority finds at least one aggravating circumstance. The sentencing authority is required to consider the existence of mitigating circumstances. A sentence of death may be imposed only if the mitigating circumstances do not outweigh the aggravating circumstances. Although the sentencing authority still has discretion under the statute, it is guided by clear and objective standards. *See Gregg v. Georgia, supra*, 428 U.S. at 197-98.
>
> "Moreover, the statutory scheme incorporates the third major safeguard against arbitrariness, *i.e.*, the expedited automatic appeal of all death sentences to this Court. As indicated, we are enjoined by statute to review each sentence of death and determine whether it was arbitrarily imposed, whether the evidence supports the finding of the existence of an aggravating circumstance and whether it is not outweighed by mitigating circumstances and, finally, whether the sentence is disproportionate to sentences imposed in similar cases."

More recently, in *Johnson v. State*, 292 Md. 405, 437, 439 A.2d 542, 560 (1982), we observed that § 413 of Maryland's capital sentencing statute guides the discretion vested in the sentencing authority by setting forth clear and objective standards to insure that the death penalty is not inflicted in an arbitrary and capricious manner in violation of constitutional principles.

V

We now proceed to consider the imposition of the death penalty in this case and to determine whether, under § 414 (e) of the statute, it was imposed (1) under the influence of passion, prejudice, or any other arbitrary factor; (2) whether

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the evidence supports the jury's finding of a statutory aggravating circumstance; (3) whether the evidence supports the jury's finding that the aggravating circumstances were not outweighed by mitigating circumstances; and (4) whether the death sentence was "excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant."

The record of the resentencing hearing discloses, as did the evidence at Tichnell's original trial, that on January 18, 1979, at approximately 5:25 a.m., Tichnell and a confederate, Oscar Recek, broke into Davidson's store in Oakland, Maryland, for the purpose of stealing handguns. The breaking triggered a silent alarm in the nearby sheriff's office and Deputy Sheriff David Livengood, accompanied by his 108-pound K-9 dog, promptly responded to the scene. The store, located between parallel Routes 219 and 4, had its entrance on Route 219; Route 4 was approximately 252 feet from the rear of the store. Sometime between 5:28 a.m. and 5:31 a.m., Livengood reported over his police radio that he was proceeding to investigate a suspect vehicle. At approximately 5:37 a.m., the police received a call from James Wolfe, who lived behind Davidson's store; he reported hearing shots. Shortly thereafter, the police arrived at the scene and discovered Livengood's body lying face down at the northern edge of Route 4. He had been shot seven times and was dead. His service revolver with three live and three spent cartridges was located beneath his body. A pair of handcuffs was found in the road about 23 feet from the deputy's body. Livengood's police cruiser was missing. His K-9 dog was found lying off of Route 4 about 26 feet from Livengood's body; the dog had been stabbed in the left shoulder region and died shortly after the arrival of the police. A car belonging to Tichnell was found in a snow-filled ditch partially off of Route 4; it was facing south and was about 40 feet from the deputy's body. Two bullet holes were observed in Tichnell's car, one at the left front door near the door lock and the other at the left front area of the doorpost. A 9 millimeter Browning semiautomatic revolver owned by

Tichnell and later identified as the homicide weapon was found in the front seat of Tichnell's abandoned vehicle. The gun contained seven empty shells and seven loaded cartridges; two of the spent cartridges were found on the floor of Tichnell's car behind the driver's seat. The other five casings were scattered about Route 4 in a cluster near the deputy's body.

The State's witness Wolfe testified that just prior to the shooting he observed a car facing north stopped on Route 4 with its headlights on. He also observed a dog pacing back and fourth in front of the car's headlights. Wolfe said the dog disappeared after about 10 seconds and that 15 seconds later he heard a burst of shots, followed by a split second pause, the sound of tires spinning and a simultaneous second burst of shots. Wolfe testified that he then saw a second car, without headlights, move about 20 to 30 feet in a southerly direction on Route 4, after which he heard a "thump." Shortly thereafter, Wolfe noted the vehicle with the headlights leave the area.

Tichnell and Recek were arrested on the morning of the crime in West Virginia; they were driving a vehicle which Tichnell had commandeered after wrecking the deputy's cruiser in the course of their flight from the crime scene. In the vehicle was a bag containing the guns stolen from Davidson's store and a samurai sword with dog blood and hair on it. Also in the car was a shoulder holster capable of accommodating a Browning semiautomatic revolver; the holster was stained with blood of a type matching Tichnell's. Tichnell had a gun shot wound in his right shoulder, a laceration over his right eye and a crushed tooth. On the evening of his arrest, Tichnell gave the West Virginia state police authorities a statement admitting that he and Recek had broken into Davidson's store and stolen some guns. He said that they remained in the store about 3 to 5 minutes and were returning to their car when Recek said that he had lost the loaded .38 Smith and Wesson revolver which Tichnell had given him just before they broke into the store. Because this was the same gun that Tichnell had stolen 3 days earlier

from Davidson's store, and because it contained his fingerprints, Tichnell directed Recek to retrace his steps and find the weapon. Rather than risk detection, Tichnell said that he drove around the Oakland area to give Recek time to find the lost gun. Tichnell told the police that he returned to Route 4, moving in a southerly direction, to pick up Recek when he saw a police cruiser facing north blocking his lane. At this moment, Tichnell said that his car headlights, which had been defective for some period of time, went out. He observed that an officer, gun in hand, had apprehended Recek and had him lying on the ground. Tichnell said he stopped his car about 15 to 20 feet from the police car and got out to repair his headlights. At this time, the officer pointed his weapon at him and told him to lie down on the road. Tichnell complied and he heard the deputy order his K-9 dog to watch him. The dog stood over Tichnell and as he looked up the dog bit him on the side of his eye and through the inside of his mouth. Tichnell said that he screamed out with pain, became hysterical, and started running around in a circle to avoid the dog. Believing that the dog had torn his eye out, Tichnell ran to his car to get a medical aid kit which he kept in the back seat. At this point Tichnell heard the deputy order the dog to watch Recek; the deputy then followed Tichnell to his car, spun him around and placed a gun in his face. At this time, the door on the driver's side of Tichnell's two-door vehicle was open. Tichnell said he moved the deputy's weapon from his face and requested that the officer permit him to tend to his wounded eye. Tichnell stated that the deputy then put his gun against his (Tichnell's) shoulder and shot him from a distance of about a foot and a half. Tichnell said that the shot knocked him into his car and that he grabbed the barrel of the deputy's gun as he fell. Tichnell said that the deputy then tried to bring his gun down for another shot. While still holding the deputy's gun, Tichnell said he reached for his own gun which he kept under the front seat of his car. As the scuffle continued, the deputy fired again, the bullet narrowly missing the top of Tichnell's head. Tichnell stated that because he thought the deputy was going to shoot him again, he fired

four to five shots at the deputy at point-blank range. He said that the first shot struck the deputy in the head, and he was certain that he was dead.

Tichnell acknowledged in his statement that he and Recek attempted to leave the scene in Tichnell's car. After moving about 30 or 40 feet, Tichnell said that the car slid on the ice and went off the road into a ditch. Realizing that his car was stuck, Tichnell decided to take the deputy's cruiser, but found the dog sitting in the front seat. As Recek attempted to get in the open door of the car, the dog lunged at him. Tichnell thereupon removed his samurai sword from his car and stabbed the dog behind its left shoulder; when he withdrew the sword, the dog rolled out of the car. Tichnell said that he and Recek then fled in the deputy's cruiser but subsequently wrecked it. Thereafter, he and Recek obtained another vehicle and continued their flight into West Virginia. Tichnell's statement was introduced in evidence before the sentencing jury.

Other evidence adduced by the State showed that of the seven shots fired into the deputy's body two were fatal, one in the lower back and the other in the back of the head. No powder burns were found on the clothing or upon the wounds of Tichnell or Livengood. The State produced testimony that had the shots been fired at a range less than 3 feet, burned powder residue would have been found on the clothing or wounds of both the deputy and Tichnell. The expert witness concluded that the shots were fired at a distance greater than 3 feet. Evidence produced by the State that Tichnell's bloody shoulder holster was recovered at the time of his arrest was intended to establish that Tichnell was wearing the holster at the time he was shot in the shoulder and carried his Browning revolver in it when he broke into Davidson's store. There was evidence that Tichnell's blood type was found on broken glass fragments from the windshield of the deputy's car, suggesting that the lacerations over Tichnell's eye may have been received at the time Tichnell wrecked the deputy's cruiser. According to one of the arresting troopers, when Tichnell was first arrested he

attributed the cut on his eye to the car accident and did not mention a dog bite. Evidence was also adduced to show that in view of the time involved between the break-in at the store, and the shooting of the deputy, Tichnell could not have traversed the 2.3 mile route around Oakland which he said he had taken.

Recek, who was 32 years old at the time of the crime, testified on Tichnell's behalf. In the course of his testimony, he acknowledged entering Davidson's store with a loaded gun given to him by Tichnell. He said that Tichnell told him that because of the silent alarm at the store, it was critical that they be out of the store in less than 5 minutes. He acknowledged returning to the store at Tichnell's direction to look for the lost gun, after which he proceeded toward Route 4. He was in the middle of the field behind Davidson's store, he said, when he saw the taillights of Tichnell's car on Route 4, being followed by a police cruiser. Recek testified that the police car stopped when the officer saw him in the field; that it then turned around and that, as he did so, Tichnell circled the area in his vehicle. Recek said that he was about 10 feet from Route 4 when the deputy, accompanied by his K-9 dog, with his gun in hand and handcuffs out, told him he was under arrest and to lie on the ground. After obeying this command, Recek said he observed Tichnell's car on Route 4 with its headlights blinking on and off. He testified that he saw Tichnell approach the deputy and speak with him; that the deputy ordered Tichnell to lie on the ground and directed his K-9 dog to guard him; that shortly thereafter, Tichnell screamed out that the dog had bit him in the eye and that he was blind; that Tichnell shouted that he was going to his car to get a medical kit; and that at this point Livengood ordered the K-9 dog to leave Tichnell and to guard Recek. From his position on the ground, with the dog barking in his face, Recek said he caught only a "glimpse" of what next occurred; that Livengood and Tichnell left his sight and he next heard a burst of shots as the two men approached the side of Tichnell's car, after which he observed Livengood

"back tracking" and fall on the ground. Recek said that immediately after the shooting Tichnell said that he "outdrew" the deputy; that it was "He or me"; that he had "No choice"; and that, in addition, he had to kill the dog "or he would have got me."

Recek acknowledged that he had been convicted of the first degree felony murder of Livengood in a separate trial and sentenced to life imprisonment. At the time of Tichnell's original trial and two subsequent sentencing hearings, Recek's case was pending and he did not testify in any of these proceedings.

Tichnell's testimony before the sentencing jury was generally consistent with his statement to the police on the evening of his arrest. Additionally, he testified that he knew that a silent alarm had been triggered when he broke into Davidson's store and also knew that an officer would be on his way to the scene within from 2 to 3 minutes. Tichnell testified that while he was unarmed at the time he entered the store, he had given Recek a loaded revolver to carry into the store. He testified that his shoulder holster was under the seat of his car at the time of the shooting; that after the shooting he put his Browning revolver in the holster with the intention of taking it with him in the deputy's car as he fled the scene; that the gun must have slipped out of the holster, remaining in Tichnell's abandoned car; that he nevertheless wore the holster without his gun after the shooting occurred. At another point, Tichnell testified that the muzzle of Livengood's gun was pressed against his shoulder when Livengood fired the first shot and that the deputy's other shots were fired from a distance of 6 to 8 inches.

At the time of the crime, Tichnell was 32 years of age. He was a high school graduate, a divorced father of one child, had no prior criminal record, had served in the Army for several years, had worked at a steel mill for a number of years but had been unemployed for over one year at the time of the crime.

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To refute the State's expert testimony that the shots were fired at a distance greater than 3 feet, Tichnell produced an expert witness who said that he found a single grain of powder on the coat which Tichnell was wearing at the time of the shooting, indicating that the shots had been fired at point-blank range, as Tichnell had claimed.

At the conclusion of the evidence, Judge Bowen gave detailed instructions to the jury as required by § 413 (c) (3) of the statute. The jury concluded that the two aggravating circumstances upon which the State relied had been established and that the only mitigating circumstance was that Tichnell had not previously been convicted of a crime of violence. Tichnell was then sentenced to death in accordance with the provisions of the statute.

(A)

Tichnell does not contend, nor do we find from the record, that the death sentence was imposed upon him under the influence of passion, prejudice or any other arbitrary factor in violation of § 414 (e) (1). Moreover, as required by § 414 (e) (2), we have considered, and conclude, that the evidence before the sentencing authority supports its finding of two statutory aggravating circumstances, *i.e.*, that Livengood was a law enforcement officer who was murdered while in the performance of his duties, and that Tichnell committed the murder in furtherance of an escape or an attempt to evade lawful custody or arrest by a law enforcement officer. We further conclude from our review of the case, as required by § 414 (e) (3), that the aggravating circumstances are not outweighed by the single mitigating circumstance that Tichnell had not previously been convicted of a crime of violence, as defined in § 413 (g) (1).

(B)

(Proportionality Review)

We observed in *Tichnell I, supra*, 287 Md. at 738-39, that the language of § 414 (e) (4) of the Maryland statute is virtually identical to, and was patterned after, the proportionality review provisions of the Georgia death penalty statute. The Supreme Court in *Gregg* noted with approval that the Georgia provision functioned as a check against the arbitrary imposition of the death penalty. *Gregg, supra*, 428 U.S. at 206. As summarized in *Gregg*, the proportionality review provision of the Georgia statute:

> "substantially eliminates the possibility that a person will be sentenced to die by the action of an aberrant jury. If a time comes when juries generally do not impose the death sentence in a certain kind of murder case, the appellate review procedures assure that no defendant convicted under such circumstances will suffer a sentence of death." *Id.* at 206.

It was argued in *Gregg* that the Georgia proportionality review provisions were inadequate because "nonappealed capital convictions where a life sentence is imposed and cases involving homicides where a capital conviction is not obtained are not included in the group of cases which the Supreme Court of Georgia uses for comparative purposes." *Id.* at 204 n. 56. In answer to this contention, the Supreme Court simply noted that the Supreme Court of Georgia is authorized to consider such cases and does consider appealed murder cases where a life sentence has been imposed. It concluded: "We do not think that the petitioner's argument establishes that the Georgia court's review process is ineffective." *Id.* at 204 n. 56.

The Supreme Court's decisions in *Proffitt* and *Jurek* indicate that the absence of a specific statutory provision for proportionality review will not render a death penalty statute constitutionally infirm. In *Proffitt*, the Court said:

> "The statute provides for automatic review by the Supreme Court of Florida of all cases in which a death sentence has been imposed.... The law differs from that of Georgia in that it does not require the court to conduct any specific form of review. Since, however, the trial judge must justify the imposition of a death sentence with written findings, meaningful appellate review of each such sentence is made possible, and the Supreme Court of Florida, like its Georgia counterpart, considers its function to be to '[guarantee] that the [aggravating and mitigating] reasons present in one case will reach a similar result to that reached under similar circumstances in another case.... If a defendant is sentenced to die, this Court can review that case in light of the other decisions and determine whether or not the punishment is too great.' *State v. Dixon*, 283 So.2d 1, 10 (1973).
>
> On their face these procedures, like those used in Georgia, appear to meet the constitutional deficiencies identified in *Furman*."
> 428 U.S. at 250-51.

The review process was attacked on the ground that "the role of the Supreme Court of Florida in reviewing death sentences is necessarily subjective and unpredictable." *Id.* at 258. Rejecting this contention, the Court stated:

> "While it may be true that that court has not chosen to formulate a rigid objective test as its standard of review for all cases, it does not follow that the appellate review process is ineffective or arbitrary. In fact, it is apparent that the Florida court has undertaken responsibility to perform its function of death sentence review with a maximum of rationality and consistency. For example, it has several times compared the circumstances of a case under review with those of previous cases in which it has assessed the imposition of death sentences.

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> *See, e.g., Alford v. State*, 307 So.2d. at 445; *Alvord v. State*, 322 So.2d. at 540-541. By following this procedure the Florida court has in effect adopted the type of proportionality review mandated by the Georgia statute. *Cf. Gregg v. Georgia, ante*, at 204-206. And any suggestion that the Florida court engages in only cursory or rubber-stamp review of death penalty cases is totally controverted by the fact that it has vacated over one-third of the death sentences that have come before it." *Id.* at 258-59.

The petitioner also maintained that

> "since the Florida Court does not review sentences of life imprisonment imposed in capital cases or sentences imposed in cases where a capital crime was charged but where the jury convicted of a lesser offense, it will have an unbalanced view of the way that the typical jury treats a murder case and it will affirm death sentences under circumstances where the vast majority of judges would have imposed a sentence of life imprisonment." Id. at 259 n. 16.

The Court also rejected this argument, stating:

> "As we noted in *Gregg v. Georgia, ante*, at 204 n. 56, this problem is not sufficient to raise a serious risk that the state capital-sentencing system will result in arbitrary and capricious imposition of the death penalty." 428 U.S. at 259 n. 16.

The Texas statute upheld in *Jurek* provided for an automatic appeal, but also lacked an express provision for proportionality review. The Court nevertheless assumed that death sentences were subject to this type of review, stating:

> "By providing prompt judicial review of the jury's decision in a court with statewide jurisdiction, Texas has provided a means to promote the evenhanded, rational, and consistent imposition of

> death sentences under law. Because this system serves to assure that sentences of death will not be 'wantonly' or 'freakishly' imposed, it does not violate the Constitution." 428 U.S. at 276.

It is thus clear that the essential principle underlying the varieties of proportionality review upheld in *Gregg*, *Proffitt* and *Jurek* is, in short, the guarantee that death sentences will be imposed in a reasonably consistent manner. *Tichnell I*, *supra*, 287 Md. at 741.

With these foundation principles in mind, the Court sua sponte asked the parties in this case to address themselves to a number of additional issues, the first of which was:

> "Whether the Court of Appeals, in determining whether the imposition of the death sentence under . . . sec. 414 (e) (4) is 'excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant,' is (a) limited to considering only those first degree murder prosecutions where the prosecutor actually sought the imposition of the death penalty or (b) required to consider all first degree murder prosecutions eligible under sec. 413 for imposition of the death sentence, without regard to whether the prosecutor actually sought the imposition of the death penalty?"

Adopting arguments advanced by the Public Defender in three death penalty cases now pending before us,[9] Tichnell maintains that the pool of cases under § 414 (e) (4) from which "similar cases" are to be selected for purposes of proportionality review was intended by the legislature to include all cases in which the prosecutor sought the death penalty, whether it was imposed or not. Also to be included, Tichnell maintains, are all other death-eligible murder

9. *See* consolidated Supplemental Brief of the Public Defender in Annette Louise Stebbing v. State of Maryland, Nos. 35 and 103, September Term, 1981; Eugene Sherman Colvin v. State of Maryland, Nos. 84 and 114, September Term, 1981; and James Arthur Calhoun v. State of Maryland, No. 129, September Term, 1981 and No. 5, September Term, 1982.

cases in which the prosecutor could have, but did not seek the death penalty.[10] To restrict the relevant inventory to cases in which the death penalty was actually sought, it is argued, would skew the proportionality review pool by excluding from it a number of truly similar cases and, conversely, by including in it cases which, in large urban jurisdictions like Baltimore City, would not have been prosecuted as capital offenses. Tichnell further suggests that even murders which cannot be punished capitally under § 413 may be similar to the death sentence under review and are, therefore, within the formulation of § 414 (e) (4).

The State maintains that the relevant inventory of cases under § 414 (e) (4) includes only those in which a capital sentencing proceeding was actually conducted, whether the sentence imposed was life or death. In this regard, the State submits that because the aim of proportionality review is to ascertain what other capital sentencing authorities have done with similar capital murder offenses, the only cases that could be deemed similar under § 414 (e) (4) are those in which imposition of the death penalty was properly before the sentencing authority for determination. The State urges that it is improper to use every first degree murder case as a basis for comparison because cases in which no qualifying aggravating circumstances under § 413 are present could not be prosecuted capitally and are, therefore, patently dissimilar. Moreover, the State argues that cases in which the death penalty was not sought, despite the presence of a qualifying aggravating factor under § 413, are not similar because the sentencing authority never considered whether the death sentence should be imposed.

Twenty-five states have statutes or rules containing a proportionality review provision identical to or closely par-

10. Capital murder is an offense for which the death penalty may but need not be imposed. *See* Black's Law Dictionary 189 (5th ed. 1979); Ballentine's Law Dictionary 173 (3rd ed. 1969).

alleling § 414 (e) (4) of the Maryland statute.[11] Of these, three states limit their pool of cases for comparative review to capital offenses in which the death penalty was actually imposed. *See Gall v. Com.*, 607 S.W.2d 97 (Ky. 1980); *King v. State*, 421 So.2d 1009 (Miss. 1982); *State v. Copeland*, 103 S.C. 1802, 300 S.E.2d 63 (1982). Eight states by case law appear to restrict the universe of cases eligible for proportionality review to similar capital murder prosecutions, whether the penalty imposed was life or death. *See* Georgia: *Horton v. State*, 249 Ga. 871, 295 S.E.2d 281 (1982); *Hill v. State*, 250 Ga. 277, 295 S.E.2d 518 (1982); *Ross v. State*, 233 Ga. 361, 211 S.E.2d 356 (1974);[12] Missouri: *State v. Trimble*, 638 S.W.2d 726 (1982); *State v. Baker*, 636 S.W.2d 912 (1982); *State v. Bolder*, 635 S.W.2d 673 (1982); *State v. McIlvoy*, 629 S.W.2d 333 (1982); *State v. Mercer*, 618 S.W.2d 1 (1981); Montana: *State v. Coleman*, 605 P.2d 1000 (1979), *rehearing denied*, 605 P.2d 1051; Nebraska: *State v. Moore*, 210 Neb. 457, 316 N.W.2d 33 (1982); *State v. Williams*, 205 Neb. 56, 287 N.W.2d 18 (1979); Nevada: *Deutscher v. State*, 95 Nev. 669, 601 P.2d 407 (1979); North Carolina: *State v. Williams*, 308 N.C. 47, 301 S.E.2d 335 (1983); *State v. McDougall*, 308 N.C. 1, 301 S.E.2d 308 (1983); Oklahoma: *Parks v. State*, 651 P.2d 686 (Crim. App. 1982); *Jones v. State*, 648 P.2d 1251 (Crim. App. 1982); Virginia: *Clanton v. Com.*, 223 Va. 41, 286 S.E.2d 172 (1982); *Whitley v. Com.*, 223 Va. 66, 286 S.E.2d 162 (1982); *Stamper v. Com.*, 220 Va. 260, 257 S.E.2d 808 (1979); *Coppola v. Com.*, 220 Va. 243, 257 S.E.2d 797 (1979). Washington, by statute, restricts its proportionality review to similar capital cases in which the sentencing authority considered the imposition of the death penalty.[13] Tennessee, by statute and rule, appears to

11. The states are: Alabama, Connecticut, Georgia, Idaho, Kentucky, Louisiana, Massachusetts, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, North Carolina, Ohio, Oklahoma, Pennsylvania, South Carolina, South Dakota, Tennessee, Virginia, Washington, and Wyoming.

12. The *Ross* and *Horton* cases give some indication that occasionally the court compares other murder cases in the courts of its proportionality review.

13. *See* Wash. Rev. Code § 10.95.130 (2) (b).

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follow the same course.[14] The interpretation of the proportionality review provisions of the Alabama and Louisiana statutes is unclear. *See, e.g., Beck v. State*, 396 So.2d 645 (Ala. 1981) and *State v. Martin*, 376 So.2d 300 (La. 1979). Ten other states having a provision like § 414 (e) (4) have no case law articulating the relevant universe of cases for purposes of proportionality review.[15]

The comparative review provision of Delaware's statute differs from § 414 (e) (4) in that it provides for proportionality review to determine whether, in light of the totality of the aggravating and mitigating circumstances, and other factors, the death penalty was disproportionate to the penalty imposed "in similar cases *arising under this section*."[16] (Emphasis supplied.) *See State v. White*, 395 A.2d 1082 (Del. 1978).[17]

A number of states have death penalty statutes without an express proportionality review provision. These jurisdictions nevertheless engage in various modes of comparative review of death sentences. Arizona, Florida, Illinois and Indiana appear to limit their proportionality pool of similar cases to capital murder offenses, whether the sentence imposed was life or death. *State v. Ortiz*, 131 Ariz. 195, 639 P.2d 1020 (1981); *State v. Richmond*, 114 Ariz. 186, 560 P.2d 41 (1976); *Brown v. Wainwright*, 392 So.2d 1327 (Fla. 1981); *McCaskill v. State*, 344 So.2d 1276 (Fla. 1977); *People v. Brownell*, 79 Ill.2d 580, 404 N.E.2d 181 (1980); *Glecker v. People*, 82 Ill.2d 145, 411 N.E.2d 849 (1980); *Williams v. State*, 430 N.E.2d 759 (Ind. 1982); *Judy v. State*, 416 N.E.2d 95 (Ind. 1981). Arkansas restricts its inventory to cases in which the death penalty was actually imposed. *See Sumlin v. State*, 273 Ark. 185, 617 S.W.2d 372 (1981); *Collins v. State*, 261 Ark. 195, 548 S.W.2d 106 (1977). California's situation is more fluid; it studies various aspects of each death sentence to assure that it is imposed in an

14. *See* Tenn. Code Ann. § 39-2406 (c) and Supreme Court Rule 12.

15. The states are: Connecticut, Idaho, Massachusetts, New Hampshire, New Jersey, New Mexico, Ohio, Pennsylvania, South Dakota, and Wyoming. *See*, however, Com. v. Zettlemoyer, 454 A.2d 937 (Pa. 1982).

16. *See* Del. Code Ann. Tit. 11, § 4209 (g) (2) a.

17. Colorado's proportionality review provision is also different from Maryland's but no cases have as yet interpreted that state's law on the subject.

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even-handed manner and that the crime is not punished more severely than more serious offenses. *See People v. Jackson*, 28 Cal.3rd 264, 168 Cal. Rptr. 603, 618 P.2d 149 (1980); *People v. Frierson*, 25 Cal.3rd 142, 158 Cal. Rptr. 281, 599 P.2d 587 (1979). *See also Harris v. Pulley*, 692 F.2d 1189 (9th Cir. 1982), *cert. granted*, ___ U.S. ___ (1983). Texas and Utah's proportionality review procedures appear to be similar to those followed in California. *See Jurek v. Texas*, *supra*; *Roney v. State*, 632 S.W.2d 598 (Tex. Cr. 1982); *State v. Pierre*, 572 P.2d 1338 (Utah, 1978).

Considering the purpose of proportionality review in death sentence cases, the language of § 414 (e) (4), the law in other jurisdictions with proportionality review provisions like our own, and the views expressed by legal commentators,[18] we conclude that the legislatively intended inventory of cases from which "similar cases" are to be culled encompasses only those first degree murder cases in which the State sought the death penalty under § 413, whether it was imposed or not. This interpretation of § 414 (e) (4) is consistent with the implementing provisions of Maryland Rule 772A which requires, for purposes of proportionality review, that trial judges file detailed informational reports only in such cases.

The focus of § 414 (e) (4) is upon capital cases in which the sentencing authority determined whether to impose a life or death sentence; the subsection aims to assure that upon consideration of both the crime and the defendant the

18. Legal commentators have expressed the view that the death sentence is comparatively excessive if other defendants with similar characteristics generally receive sentences other than death for committing factually similar offenses in the same jurisdiction. *See* D. Baidus, C. Pulaski, G. Woodworth and F. Kyle, *Identifying Comparative Excessive Sentences of Death: A Quantitative Approach*, 33 Stan. L. Rev. 1 (1980). While the authors caution against making the universe of cases so large as to render it impossible to conduct any meaningful proportionality review, they suggest that the case inventory include a sufficient number of potentially similar murder cases where both life and death sentences were imposed. *Id.* at 7 n. 15; they urge that courts compare, "at a minimum, . . . the facts and circumstances of the death sentence case under scrutiny with the facts and circumstances of factually similar cases involving similar defendants in which the options available to the sentencing authority included a sentence of death." *Id.* at 5 n. 13.

aggravating and mitigating circumstances present in one capital case will lead to a result similar to that reached under similar circumstances in another capital case, thus identifying the aberrant sentence and avoiding its ultimate imposition. This, of course, is the constitutional purpose of proportionality review as articulated in *Gregg* and *Proffitt* and as to which we think the General Assembly intended to subscribe in enacting § 414 (e) (4). No case is potentially similar within the contemplation of the statute, therefore, unless the death penalty was an authorized punishment. Thus, § 414 (e) (4) does not require a comparative review of capital cases in which the sentencing authority considered the imposition of the death penalty with non-capital cases in which it did not; indeed, such a comparison would not be of "similar cases."

At our direction, the parties next considered the question whether the pool of cases available for proportionality review under § 414 (e) (4), as we have defined it, is so limited as to render that section violative of the state or federal constitutions. As we have already observed, the Supreme Court in *Gregg* and *Proffitt* indicated that the comparative review of death sentences required by the constitution need not include nonappealed capital cases where a life sentence was imposed, homicide cases where a capital conviction was not obtained, or those in which the defendant was convicted of a lesser offense. Implicit in these Supreme Court cases is the conclusion that to include in the relevant inventory of cases only those in which the death penalty was sought does not violate the due process or cruel and unusual punishment provisions of the federal constitution. The cases are generally in accord. *See Gray v. Lucas*, 677 F.2d 1086 (5th Cir. 1982); *Ross v. State*, 233 Ga. 361, 211 S.E.2d 356 (1974), *cert. denied*, 428 U.S. 910 (1976); *Williams v. State*, 430 N.E.2d 759 (Ind.), *appeal dismissed*, 103 S. Ct. 33 (1982); *State v. Bolder*, 635 S.W.2d 673 (Mo. 1982), *cert. denied*, 103 S. Ct. 770 (1983); *State v. Williams*, 205 Neb. 56, 287 N.W.2d 18 (1979), *cert. denied*, 449 U.S. 891 (1980); *State v. Williams*, 308 N.C. 47, 301 S.E.2d 335 (1983); *State v.*

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Copeland, S.C. , 300 S.E.2d 63 (1982), *cert. denied*, 103 S. Ct. 1802 (1983); *State* v. *Melson*, 638 S.W.2d 342 (Tenn. 1982). Nothing in the Maryland Constitution requires a different result. In so concluding, we do not preclude any defendant whose death sentence is under appellate review from presenting argument, with relevant facts, that designated non-capital murder cases are similar to the case then under scrutiny and should be taken into account in the exercise of our proportionality review function.

Also at our direction the parties briefed and argued two other questions: Whether the relevant inventory of similar cases is (1) limited to those decided under constitutional death penalty statutes and (2) restricted to cases arising in Maryland. We conclude, as we intimated in *Tichnell I*, *supra*, 287 Md. at 742 and cases there cited, that the better rule is to restrict the comparative analysis to cases decided under constitutional death penalty statutes and to those decided under our own State law.

Finally, we directed that the parties inform us as to the factors or criteria governing proportionality review in other jurisdictions having death penalty statutes. The question, the parties suggest, and we agree, does not admit of a definitive response. In general, the proportionality review function is conducted by other jurisdictions, as it will be in Maryland, in accordance with the fundamental constitutional principle of avoiding the arbitrary or capricious imposition of the death penalty by affording similar treatment to similar capital cases, considering both the crime and the defendant.

VI

(The Death Sentence In This Case)

Having exercised our constitutionally mandated proportionality review function, we conclude that the death sentence imposed upon Tichnell was neither excessive nor disproportionate to the penalty imposed in similar cases in Maryland, considering both the crime and the defendant.

The wilful, deliberate and premeditated murder of a police officer while in the performance of his duties has long been viewed as an especially grievous crime. In *Roberts v. Louisiana*, 431 U.S. 633, 636, 97 S. Ct. 1993, 52 L. Ed. 2d 637 (1977), the Supreme Court said: "To be sure, the fact that a murder victim was a police officer performing his regular duties may be regarded as an aggravating circumstance [in death penalty statutes]." [19] Such a killing constitutes an assault on society itself for, as stated in *Roberts*, at 636, "There is a special interest in affording protection to these public servants who regularly must risk their lives in order to guard the safety of other persons and property." [20]

That Tichnell had not previously been convicted of a crime of violence was a mitigating circumstance in his favor; indeed, it was the single mitigating factor found by the sentencing jury which concluded that it did not outweigh the two aggravating factors present in the case. Manifestly, the sentencing authority rejected Tichnell's self-defense version of the killing — a version given little more than lukewarm support by the testimony of Recek. The evidence showed that Tichnell was a mature man, that he was armed when he came to the crime scene, and fully expected that the deputy would respond promptly to the silent alarm. From its findings, it is readily apparent that the sentencing jury believed that the killing of Deputy Livengood was intentional and in furtherance of Tichnell's purpose to avoid apprehension. That several of the fatal shots were fired into the deputy's back may have suggested to the jury that Tichnell ambushed the officer from behind while he was in the process of apprehending Recek.

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19. Compare cases in which the Supreme Court, applying the principle of constitutional proportionality, has declared capital punishment *per se* excessive in certain circumstances. *See* Enmund v. Florida, 458 U.S. , 102 S. Ct. 3368, 73 L. Ed. 2d 1140 (1982) (death penalty excessive for felony murder when defendant did not take or attempt to take life or intend that a life be taken or that lethal force be used); Coker v. Georgia, 433 U.S. 584, 97 S. Ct. 2861, 53 L. Ed. 2d 982 (1977) (sentence of death disproportionate and excessive punishment for the crime of rape).

20. In *Roberts*, the Supreme Court noted the dangerous nature of the police officer's calling; it indicated that statistics demonstrated that the number of police officers killed in the line of duty more than doubled in the last 10 years. 431 U.S. at 636 n. 3.

Since the enactment of Maryland's death penalty statute in 1978, to the present time, forty-eight capital sentencing proceedings have been conducted in seventeen of the State's twenty-four circuit courts, involving forty-one different defendants.[21] *See* Appendix A. While some of the cases involved multiple aggravating circumstances, the primary aggravating factor in a number of cases was that the murder was committed in the course of a robbery. Other cases involved murders committed in the course of a rape or sexual offense in the first degree; one case involved murder committed in the performance of an arson. Two cases involved contract murders. The aggravating circumstance in still other cases was that the defendant committed more than one first degree murder arising out of the same incident. Four cases charged, as aggravating circumstances, that a police officer was murdered while in the performance of his duties and in furtherance of an escape, or attempt to escape from or evade the officer's lawful apprehension. In other cases, the aggravating circumstance was that the victim was a hostage taken in the course of a kidnapping.

Of the sentencing proceedings in these cases, twenty-eight resulted in the imposition of a life sentence, either by determination of the sentencing authority, by a deadlocked jury, or because of the inability of the jury to agree on a verdict within a reasonable time. See § 413 (k). Twenty capital sentencing proceedings, involving fifteen different defendants, resulted in the imposition of the death penalty. Of these, the Court has vacated the death penalty in nine proceedings because of error committed either at the trial stage of the proceedings or because of errors committed in the capital sentencing hearing; these cases were remanded for a new sentencing hearing. Of the remaining eleven cases, one was terminated by the suicide of the defendant. In another case, the trial judge vacated the death sentence and ordered

21. In addition to Tichnell's 3 capital sentencing hearings, Timothy Clyde Poole also had 3 capital sentencing hearings. *See* Poole v. State, 290 Md. 114, 428 A.2d 434 (1981); Poole v. State, 295 Md. 167, 453 A.2d 1219 (1983).

a new sentencing hearing. In addition to *Tichnell III*, eight cases are now pending before us on appeal.

In the process of our proportionality review in this case, we reviewed the Rule 772A trial judge's report in each of the capital sentencing proceedings and have selected five which we deem to be "similar" within the contemplation of § 414 (e) (4).

Oscar Recek: Recek was charged with capital murder. The State relied upon the same two aggravating circumstances that were present in Tichnell's case. At his trial, Recek testified essentially as he did at Tichnell's third sentencing hearing. He also introduced Tichnell's trial testimony as well as Tichnell's confessions, all of which indicated that it was Tichnell, and not Recek, who shot and killed the deputy.[22] The jury found Recek guilty of felony murder. At the sentencing hearing the jury found one aggravating circumstance to exist — that the murder was of a police officer in the performance of his duties. § 413 (d) (1). It did not find that, as to Recek, the murder was committed in furtherance of an escape or attempt to escape or evade lawful custody or arrest by a police officer. § 413 (d) (3). The jury found one mitigating circumstance — that Recek's act was not the sole proximate cause of the deputy's death. § 413 (g) (6). The jury imposed a life sentence.

Harlow Sails: The defendant, age 21 at the time of the offense, was convicted of premeditated capital murder of an off duty police officer in the course of an armed robbery. The State relied upon three aggravating circumstances: that the murder was of a law enforcement officer in the performance of his duties; that it was committed in furtherance of an escape or attempt to escape from or evade the lawful apprehension of a police officer; and that the murder was committed in the course of a robbery. § 413 (d) (1), (3), and (10). The evidence indicated that the officer, who was not in

22. *See* Recek v. State, No. 825, September Term, 1980, Court of Special Appeals, unreported. The evidence in the case clearly indicated that Recek was not a first degree principal in the deputy's murder.

uniform, attempted to apprehend Sails and several confederates in the course of an armed robbery, during which Sails shot the officer to death in an exchange of gunfire. The evidence indicated that Sails did not know that the victim was a police officer. The sentencing jury found that all three aggravating circumstances relied upon by the State had been established. By way of mitigating circumstances, it found that Sails had no previous record of committing a crime of violence; that the murder was committed while Sails' capacity to appreciate the criminality of his conduct or to conform his conduct to requirements of law was substantially impaired as a result of mental incapacity, mental disorder, emotional disturbance or intoxication; that it was unlikely that Sails would engage in further criminal activity that would constitute a continuing threat to society; and that other specified mitigating circumstances existed. § 413 (g) (1), (4), (7), and (8).[23] The jury imposed a life sentence.

James Calhoun: The defendant, age 28 at the time of the crime, was convicted of the premeditated first degree murder of a Montgomery County police officer who had responded to a security alarm at a mercantile establishment. The officer, in company with the assistant manager of the store, and a representative of the burglar alarm system, entered a room inside the store where Calhoun, and an accomplice, had concealed themselves. Calhoun pressed a gun against the officer's head and shot him to death. Calhoun's accomplice, Curtis Monroe, shot and killed the alarm system representative and wounded the assistant manager. Calhoun and Monroe fled after taking money from the store. The jury determined that the three aggravating circumstances charged by the State had been proved (the same aggravating circumstances as were relied upon in the Sails case). The jury found one mitigating circumstance under § 413 (g) (8),

23. The other mitigating circumstances were that Sails' criminal activity "had not been characterized by gratuitous and sadistic physical violence against persons"; that Sails was "not a sadistic executioner style killer"; and that his background and upbringing was unstable and "marked by emotional trauma, neglect and inattention, and which lacked adequate guidance and supervision contributed to his criminal conduct."

i.e., that Calhoun's background was such that he was never integrated into society and was unable to conform with its norms and moral values. The jury imposed a death sentence.

Curtis Monroe: The defendant, age 24 at the time of the offense, was convicted of the premeditated murder of the burglar alarm technician. The court, as the sentencing authority, found that the murder was committed in the course of a robbery, § 413 (d) (10). As mitigating circumstances, the court found it unlikely that the defendant would engage in further criminal activity that would constitute a continuing threat to society, § 413 (g) (7). The court also found as mitigating factors under § 413 (g) (8) that the defendant was employed, had a wife and two children, was attempting to further his education, and that his crime was not greater than that committed by other individuals who did not receive the death sentence. The court sentenced Monroe to life imprisonment.

Jackie Hughes: The defendant, almost 30 years old at the time of the crime, was convicted of the premeditated murder of a restaurant employee. The employee, who was armed, was walking to a bank to make a cash deposit when Hughes approached him from behind, spun him around and shot him. Thereafter, Hughes took the victim's money. In the course of their encounter, the employee fired several shots at Hughes but Hughes escaped. The victim subsequently died. The sentencing jury determined that the aggravating factor relied upon by the State (murder in the course of a robbery) was proved; it found, by way of mitigating circumstances, that Hughes had not previously been convicted of a crime of violence and that other unspecified mitigating factors existed under § 413 (g) (8). The jury imposed a life sentence.

We recognize that dissimilarities exist between Tichnell's case and those selected for comparative review. That these cases, as well as others in the inventory, are not more similar to Tichnell's case obviously does not mean that we cannot complete the comparative review process mandated by § 414 (e) (4); to so conclude would ascribe to the legislature an intention not to enact an effective or operative death penalty statute.

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Of the cases reviewed only Calhoun's crime resulted in a death sentence. The aggravating circumstances present in that case closely parallel those present in Tichnell's case: the single mitigating circumstance in Tichnell's case would appear to be marginally weightier than that found to exist in Calhoun's case. Monroe was not a principal in the first degree killing of the police officer; his life sentence was based on the virtually simultaneous murder of the technician in the course of the robbery. While the life of a police officer is no more precious than that of the alarm technician, Monroe's mitigating circumstances were different than those present in Tichnell's case and, arguably, more substantial. Only one aggravating circumstance was found to exist in Recek's case, and the mitigating circumstance was different than in Tichnell's case; moreover, the sentencing jury's verdict sheet makes clear that it did not believe that Recek was a first degree principal in the deputy's death. *Hughes*, the least similar of the cases reviewed, involved a sudden episode of premeditated murder of an unsuspecting victim by an individual without a prior record of a crime of violence, as in Tichnell's case. The mitigating circumstances found to exist in Sails' case were far weightier than those in any of the other cases, including Tichnell's. Moreover, although Sails' murder of the officer was premeditated, he did not know that the victim was a police officer.

Our comparative review of these similar cases is, of course, designed to avoid caprice in the decision to inflict capital punishment. However, as pointed out in *Gregg*, 428 U.S. at 203, "the isolated decision of a jury to afford mercy does not render unconstitutional death sentences imposed on defendants who were sentenced under a system that does not create a substantial risk of arbitrariness or caprice." Maryland's death penalty statute encompasses a well-defined subclass of first degree murders and, with one exception (contract murder), the death sentence may only be imposed on first degree principals. We think the Maryland statute meets the *Gregg* test in that its provisions do not create a substantial risk of arbitrariness or caprice in the capital sentencing process.

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The death sentence in Tichnell's case being neither excessive nor disproportionate under § 414 (e) (4), it must be affirmed.

Judgment affirmed, with costs.

C. 12

DEATH PENALTY CASES - APPENDIX A

DEFENDANT	DATE OF OFFENSE	TRIAL JURISDICTION	DATE OF SENTENCE	SENTENCING AUTHORITY	SENTENCE IMPOSED
William Joseph Parker	8/28/78	St. Mary's Co.	5/15/79	Jury	Life
James Thomas Porter	11/1/78	Anne Arundel Co.	10/5/79	Jury	Life (Jury deadlocked)
Dwayne T. Hayes	1/9/79	Anne Arundel Co.	10/22/80	Jury	Life
Lawrence Johnson	1/9/79	Harford Co.	10/5/81	Jury	Death (new sentencing hearing granted by trial judge)
Roberto Oscar Roth	1/18/79	Washington Co.	1/28/80	Jury	Life
Richard Danny Tichnell (I)	1/18/79	Wicomico Co.	8/24/79	Judge	Death
Richard Danny Tichnell (II)	1/18/79	Wicomico Co.	8/28/80	Jury	Death
Richard Danny Tichnell (III)	1/18/79	Calvert Co.	1/21/81	Jury	Death
Glen Sturgis	1/25 & 26/79	Wicomico Co.	6/7/79	Jury	Life (Jury deadlocked)
Theodore Scott Walker	1/28/79	Baltimore Co.	1/17/80	Judge	Life
Daniel Lee Chamberlain	8/29/79	Garrett Co.	5/11/81	Jury	Life
Robert Lee Myers	8/29/79	Carroll Co.	11/9/81	Judge	Life
Bryan Keith Quickly	9/27/79	Harford Co.	11/6/80	Judge	Life
Timothy Clyde Poole (I)	10/22/79	Calvert Co.	6/5/80	Jury	Death
Timothy Clyde Poole (II)	10/22/79	Charles Co.	2/26/81	Jury	Death
Timothy Clyde Poole (III)	10/22/79	Charles Co.	5/6/81	Jury	Life (Jury deadlocked)
Lawrence Johnson	2/21/80	Calvert Co.	1/30/81	Jury	Death
Lawrence Johnson	2/21/80	Charles Co.	9/1/81	Judge	Life
Elvin Burton	3/2/80	Baltimore City	1/1/81	Jury	Life (Jury deadlocked)
Annette Louise Stebbing	5/9/80	Harford Co.	4/20/81	Judge	Death
Eugene Sherman Colvin	9/9/80	Anne Arundel Co.	6/30/81	Jury	Death

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DEATH PENALTY CASES - APPENDIX A (page 2)

DEFENDANT	DATE OF OFFENSE	TRIAL JURISDICTION	DATE OF SENTENCE	SENTENCING AUTHORITY	SENTENCE IMPOSED
Dean Hugh Oliver	11/22/80	Howard Co.	6/23/81	Jury	Life
Martin Francis Scott	11/25/80	Baltimore City	11/6/81	Jury	Death
Nathan Ray Thomas	1/10/81	Baltimore Co.	8/17/81	Jury	Death
Doris Ann Foster	1/29/81	Cecil Co.	2/8/82	Judge	Death
Gary Allen Miller	2/25/81	Allegany Co.	11/16/81	Judge	Life
Jackie Hughes	3/2/81	Montgomery Co.	3/1/82	Jury	Life
Willie Louis Green	3/28/81	Baltimore City	1/14/82	Judge	Life
Ronald LeRoy Johnson	3/24/81	Baltimore Co.	6/8/81	Judge	Life
James Arthur Calhoun	3/27/81	Montgomery Co.	11/6/81	Jury	Death
Curtis Wayne Monroe	3/27/81	Montgomery Co.	9/28/82	Judge	Life
Vincent Tito Greco, Jr.	4/17/81	Baltimore Co.	5/14/82	Judge	Life
John Norman Huffington	5/25/81	Caroline Co.	12/2/81	Jury	Death
James Russell Trimble	7/1/81	Baltimore Co.	3/19/82	Judge	Death
Marcellis Jerome Bowers	7/8 (or 9) /81	Charles Co.	10/22/82	Jury	Death
Jackie E. Harris	8/8/81	Baltimore Co.	4/5/82	Judge	Death
Jackie E. Harris	8/8/81	Baltimore Co.	7/22/83	Jury	Death
Derrick Quinton White	8/14/81	Baltimore Co.	2/26/82	Jury	Death
Donald Thomas	10/2/81	Baltimore Co.	12/14/82	Judge	Death
Clinton W. Ellison	10/25/81	Baltimore City	1/19/81	Jury	Life
Michael Spencer Allen	12/21/81	Anne Arundel Co.	3/1/81	Judge	Life

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DEATH PENALTY CASES - APPENDIX A (page 3)

DEFENDANT	DATE OF OFFENSE	TRIAL JURISDICTION	DATE OF SENTENCE	SENTENCING AUTHORITY	SENTENCE IMPOSED
James Alexander Fields, Jr.	11/11/81	Pr. George's Co.	10/5/82	Jury	Life (Jury deadlocked)
Harlow Brian Gaile	2/8/82	Pr. George's Co.	2/11/83	Jury	Life
John Kevin Johnson	2/20/82	Pr. George's Co.	11/19/82	Jury	Life (Jury deadlocked)
James B. Wallermeyer	1/29/82	Baltimore Co.	3/4/83	Jury	Life
Jack B. Jones	6/1/82	Baltimore Co.	10/14/82	Jury	Life
Robert Louis Brantner	9/9/82	Garrett Co.	9/1/83	Jury	Life
Harold (Hal) Hines	6/21/79	Prince George's Co.	7/12/83	Jury	Life

Eldridge, J., concurring:

I concur with the result in this case and with most of the Court's opinion.

Maryland Code (1957, 1982 Repl. Vol.), Art. 27, § 414, relating to appeals in death sentence cases, provides in subsection (e) that, after reviewing the trial and sentencing hearing for errors, this Court shall consider the imposition of the death sentence and shall determine the following:

> "(1) Whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor;
>
> (2) Whether the evidence supports the jury's or court's finding of a statutory aggravating circumstance under § 413 (d);
>
> (3) Whether the evidence supports the jury's or court's finding that the aggravating circumstances are not outweighed by mitigating circumstances; and
>
> (4) Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant."

The present appeal is the first to be decided, under this State's recently enacted death penalty statute, in which the Court has found no reversible error in the trial or sentencing hearing. Consequently, the Court's opinion is the first one under the statute which has reached a consideration of the death penalty.

In this case, I agree with those portions of the Court's opinion rejecting Tichnell's claims of error in his third sentencing hearing and rejecting his constitutional attack upon the sentence. I also agree with those parts of the Court's opinion holding that the sentence should not be set aside under the above-quoted paragraphs (1), (2) and (3) of § 414 (e). Although concurring in the result of the Court's proportionality review under paragraph (4), I disagree with

that portion of Part V (B) of Chief Judge Murphy's opinion which concludes "that the legislatively intended inventory of cases from which 'similar cases' are to be culled encompasses only those first degree murder cases in which the State sought the death penalty . . . ."

The General Assembly, by mandating in § 414 (e) (4) that we determine whether the death sentence is disproportionate to the penalty imposed in "similar cases, considering both the crime and defendant," has specifically focused upon the two factors to be considered. They are the "crime" and the "defendant." Nothing in the language of the statute supports the view that our consideration should be further limited to those cases in which the prosecutor has exercised his discretion to seek the death penalty. The crime and defendant in another case may be similar to the crime and defendant in the case under review even though the prosecuting attorney in the former case decided, for whatever reason, not to seek the death penalty.[1]

Consideration of cases in which the State did not seek the death penalty permits our proportionality review to serve as a check against the aberrant actions of a prosecutor. For example, if in a particular type of murder case the State's Attorneys throughout Maryland generally do not seek the death penalty, but if the State's Attorney in one county regularly does seek and obtain the death penalty in the same type of case, the result would be an arbitrary imposition of the death penalty. In appeals from that one county, we would be confronted with the imposition of the death penalty in a type of case in which the penalty is not generally imposed. Unless we were willing to consider similar cases from the other counties in which the death penalty was not sought, this aberration would not be cured by our proportionality review.

1. As pointed out in both the Court's opinion and Judge Davidson's dissenting opinion, § 414 (e) (4) was patterned after the proportionality review provision of the Georgia death penalty statute, and, as discussed in Judge Davidson's opinion, the Supreme Court of Georgia has flatly taken the position that "[w]e do compare cases as to which the death penalty could have been sought by the prosecutor but was not." Horton v. State, 249 Ga. 871, 880 n. 9, 295 S.E.2d 281 (1982), *cert. denied*, ___ U.S. ___, 103 S. Ct. 837, 74 L.Ed.2d 1030 (1983) (emphasis in the original).

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In *Gregg v. Georgia*, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976), plurality opinion of Justice Stewart, joined by Justices Powell and Stevens, pointed out that the decision to impose capital punishment must be "guided by standards" (428 U.S. at 199), and that appellate proportionality review "serves as a check against the random or arbitrary imposition of the death penalty" (*id.* at 206). The concurring opinion of Justice White, joined by the Chief Justice and Justice Rehnquist, in dealing with the petitioner's argument based upon the alleged standardless prosecutorial discretion in deciding to seek the death penalty, stated (*id.* at 225):

> "Petitioner's argument that prosecutors behave in a standardless fashion in deciding which cases to try as capital felonies is unsupported by any facts. Petitioner simply asserts that since prosecutors have the power not to charge capital felonies they will exercise that power in a standardless fashion. This is untenable. Absent facts to the contrary it cannot be assumed that prosecutors will be motivated in their charging decision by factors other than the strength of their case and the likelihood that a jury would impose the death penalty if it convicts. * * * If the cases really were 'similar' in relevant respects it is unlikely that prosecutors would fail to prosecute them as capital cases: and I am unwilling to assume the contrary."

In Maryland, however, we now have facts demonstrating that prosecutors throughout the State do not employ common standards in deciding to seek the death penalty. Unlike Justice White in *Gregg*, we cannot assume that prosecutors generally seek the death penalty in cases which are similar. In *Calhoun v. State*, No. 129, September Term, 1981, and No. 5, September Term, 1982, which was consolidated with the instant case for reargument on the matter of proportionality review, and which has not yet been decided, the Public Defender's Office made a record which convincingly demonstrated that there are no common stan-

dards guiding the prosecutors in this State.[2] Anyone who reads Baltimore city newspapers or pays attention to Baltimore city news broadcasts is fully aware of the completely divergent policies concerning capital cases adhered to by different State's Attorneys Offices in the Baltimore metropolitan area.

In light of the known facts concerning the policies of Maryland State's Attorneys, proportionality review limited to those cases in which the death penalty is sought presents serious constitutional questions under the principles of *Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972), and its progeny. It is a settled principle in this State that a construction of an enactment, which does not cast doubt upon the statute's constitutionality, is preferred. *E.g., Davis v. State*, 294 Md. 370, 377, 451 A.2d 107 (1982); *State v. Zitomer*, 275 Md. 534, 544-545, 341 A.2d 789 (1975), *cert. denied sub nom. Gasperich v. Church*, 423 U.S. 1076, 96 S.Ct. 862, 47 L.Ed.2d 87 (1976); *City of Gaithersburg v. Montgomery County*, 271 Md. 505, 510, 318 A.2d 509 (1974); *Md. St. Bd. of Barber Ex. v. Kuhn*, 270 Md. 496, 505, 312 A.2d 216 (1973); *District Land v. Wash. S. S. C.*, 266 Md. 301, 312, 292 A.2d 695 (1972); *Baltimore County v. Mo. Realty*, 219 Md. 155, 159, 148 A.2d 424 (1959).

Therefore, I cannot agree with the Court's construction of § 414 (e) (4), limiting the phrase "similar cases" to encompass only those in which prosecuting attorneys sought the death penalty. I believe that the Legislature contemplated something more flexible, focusing upon murder cases in which the crime itself was similar and the circumstances surrounding the defendant were similar.

Nevertheless, the Court's opinion in this case, after setting forth its construction of § 414 (e) (4), goes on to state as follows:

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2. In that case there was testimony, from 18 of the State's 24 State's Attorneys offices, which showed the extreme differences in the standards employed to decide whether the death penalty will be sought in an eligible case. Judge Davidson's dissenting opinion in the case at bar reviews in some detail the record in the *Calhoun* case.

> "In so concluding, we do not preclude any defendant whose death sentence is under appellate review from presenting argument, with relevant facts, that designated noncapital murder cases are similar to the case then under scrutiny and should be taken into account in the exercise of our proportionality review function."

As I understand the above-quoted language, the Court is willing to consider murder cases in which the State did not seek the death penalty, and which are brought to the Court's attention by the defendant. Thus, my disagreement with the Court's construction of § 414 (e) (4) becomes academic and of little or no practical consequence. If it is asserted that the imposition of the death sentence in a particular case is an aberration, because prosecutors in Maryland generally do not seek the death penalty in that type of case, under the Court's opinion the defendant is entitled to rely upon the "similar" cases in which prosecutors did not ask for the death penalty. If, after considering those cases along with the ones in which we receive trial judge reports, we agree with the defendant's argument that the death sentence is not generally imposed in the type of case before us, the sentence will be set aside.

Furthermore, I agree with the procedure requiring the defendant to bring to our attention other murder cases in which the death penalty was not sought and which the defendant wishes us to consider. Contrary to the view expressed in the dissent, I do not believe that this procedure is too burdensome for the defendant or that it is the Court's responsibility "to assure that *all* death-eligible cases in which the death penalty has not been sought" be included in the inventory. I know of no workable and valid procedure by which the Court itself could maintain an inventory of *all* murder cases which may have been "death-eligible" and could select from such inventory the sufficiently similar cases for consideration in our proportionality review. The defendant's attorney, with the resources of the State Office

of Public Defender,[3] is in a much better position to determine which non-capital murder cases should be called to the Court's attention for purposes of proportionality review.[4]

Finally, I agree with Part VI of the Court's opinion concerning the death sentence in this case.

Cole, J., concurring:

I concur with the judgment of the Court in this case. I feel compelled to write separately, however, in order to emphasize what I view as an important aspect of the Court's holding as to proportionality review.

Under legislative mandate, the Court must determine "whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant." Md. Code Art. 27, § 414 (e) (4). The Court is obliged, therefore, to compare each death case with other cases to ensure that there is a rational basis for distinguishing the few cases in which the death penalty is imposed from the many cases in which it is not. *Tichnell v. State*, 287 Md. 695, 415 A.2d 830 (1980).

The Court today concludes that the pool of cases from which "similar cases" are to be culled includes all cases in which the death penalty was sought, whether or not it was actually imposed. Simultaneously, the Court holds that:

> In so concluding, we do not preclude any defendant whose death sentence is under appellate review from presenting argument, with relevant

3. Such assistance from the Public Defender's Office would appear to be available to any attorney representing in this Court a defendant under a death sentence. *Report Of The Public Defender, Fiscal Year 1981*, p. 43.

4. In his concurring opinion, Judge Cole expresses a preference for a court-promulgated rule requiring each State's Attorney to maintain a file of those cases where the death penalty could have been sought. I have serious doubts that such a rule would be within our rule making authority under Art. IV, § 18, of the Maryland Constitution. Moreover, the proposed rule might also violate Article 8 of the Maryland Declaration of Rights. *See, e.g.*, Duvall v. Lacy, 195 Md. 138, 149, 73 A.2d 28 (1950) ("there is no authority in the judiciary to control the members of the executive department in carrying out their duties, so long as no plain violation of the Constitution or the law is found to exist"); Miles v. Bradford, Governor of Maryland, 22 Md. 170, 183-185, 85 Am. Dec. 643 (1864).

> facts, that designated non-capital murder cases are similar to the cases then under scrutiny, and should be taken into account in the exercise of our proportionality review function.

I take this to mean that the Court, in fact, is not limiting its proportionality review to cases in which the death penalty is sought but places the onus on the defendant to expand the pool of similar cases to include cases in which the death penalty was not sought.

In my view, allowing the Court to review a pool of cases which includes cases where the prosecutor chose not to seek the death penalty, because of plea agreements or because of other tactical reasons, is essential to meaningful proportionality review and fundamental to the constitutional application of the statute. Whether the responsibility for marshalling this data imposes a constitutionally impermissible burden on the defendant is a question for another day. For the present, I am willing to assume that the various prosecutors will maintain such a data bank which they will readily make available to defense counsel, public or private.

The purpose of § 414 (e) (4) is to allow the Court to evaluate meaningfully the proportionality of a death sentence. This purpose is not served if § 414 (e) (4) is interpreted to restrict the availability of all information relevant to that inquiry, specifically the cases in which the death penalty is not sought. Only with a full range of information about the individual defendants potentially but not ultimately exposed to the death penalty can this Court make a sound proportionality decision and thereby be assured that it has given no quarter to disproportionality based solely on factors such as race, sex, or wealth.

The death penalty's disproportionate impact on racial minorities and the poor has been documented.[1] In *Furman*

1. Empirical studies in this area include: Riedel, *Discrimination in the Imposition of the Death Penalty: A Comparison of the Characteristics of Offenders Sentenced Pre-Furman and Post-Furman*, 49 Temp.L.Q. 261 (1976); Koeninger, *Capital Punishment in Texas, 1924-1968*, 15 Crime & Delinq. 132 (1969); Bedau, *Death Sentences in New Jersey*, 19 Rutgers L.Rev. 1 (1964); Zimring, Eigen & O'Malley, *Punishing Homicide in Philadelphia: Perspectives on the Death Penalty*, 43 U.Chi.L.Rev. 227 (1976).

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v. Georgia, 408 U.S. 238 (1972), two members of the Supreme Court concluded that the state statutes at issue were unconstitutional in part because race appeared to be the only basis for selecting which offenders would be sentenced to die. *See id.* at 249-52 (Douglas, J., concurring); *id.* at 364-66 (Marshall, J., concurring). Discrimination in any administrative setting, including discrimination in the prosecutorial decision to seek the death penalty, is difficult to prove. Adequate information is essential; by allowing a defendant to gather and to present to this Court information about cases in which the death penalty was not sought, an informed decision as to proportionality can be made.

Although I assume that the State's Attorneys in the several jurisdictions of this State approach their duties conscientiously and fairly, this assumption is no substitute for this Court being able to assure itself independently that they adhere to nondiscriminatory standards in distinguishing the few cases in which the death penalty is sought from the many cases in which it is not sought. As Judge Davidson's dissenting opinion ably demonstrates, there is a wide variation among the several counties and Baltimore City in their respective administration of the death penalty due to the prosecutor's unlimited discretion. Without an evaluation of the cases in which the capital sanction is not sought, it will be virtually impossible for this Court to detect any untoward discrimination in prosecutorial discretion.

I would prefer that the Court, by Rule, require each State's Attorney to maintain a file of those cases where the death penalty could have been sought, indicating the aggravating and mitigating factors present therein. This information could then be available to a defendant in a particular case. Although the Court today does not require such a procedure, it does allow a defendant to demonstrate that his sentence is disproportionate by presenting similar cases where the death penalty was not sought. How constitutionally meaningful this concession is will be left to counsel to demonstrate.

Davidson, J., dissenting:

The majority here determines that under Maryland Code (1957, 1982 Repl. Vol.), Art. 27, § 414 (e) (4) "the legislatively intended inventory of cases from which 'similar cases' are to be culled encompasses only those first degree murder cases in which the State sought the death penalty under § 413, whether it was imposed or not." Moreover, the majority here concludes "that the death sentence imposed upon Tichnell was neither excessive nor disproportionate to the penalty imposed in similar cases in Maryland, considering both the crime and the defendant." Consequently, the majority affirms the death sentence imposed. I do not agree. Accordingly, I respectfully dissent.

I

The United States Supreme Court requires that "capital punishment be imposed fairly, and with reasonable consistency, or not at all." *Eddings v. Oklahoma*, 455 U.S. 104, 112, 102 S.Ct. 869, 875 (1982). Indeed, the purpose of the Supreme Court's standards for imposition of the death penalty is to "serve both goals of measured, consistent application and fairness to the accused." *Eddings*, 455 U.S. at 111, 102 S.Ct. at 874-75. Moreover, that Court has expressly recognized that the function of appellate review is to achieve these goals. In *Jurek v. Texas*, 428 U.S. 275, 276, 96 S.Ct. 2950, 2958 (1976), the Supreme Court stated:

> "By providing prompt judicial review of the jury's decision in a court with statewide jurisdiction, Texas has provided a means to promote the *evenhanded, rational, and consistent imposition of death sentences* under law." (Emphasis added.)

More particularly, the Supreme Court has expressly recognized that proportionality review is designed to effectuate the consistent and fair application of the death penalty. Thus, in *Gregg v. Georgia*, 428 U.S. 153, 96 S.Ct. 2909 (1976), the Supreme Court acknowledged that the primary function of a state reviewing court in performing propor-

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tionality review is to assure that the death penalty is not imposed unless it has generally been imposed in similar cases throughout the state. There the Supreme Court said:

> "In performing its sentence-review function, the Georgia court has held that *'if the death penalty is only rarely imposed for an act or it is substantially out of line with sentences imposed for other acts it will be set aside as excessive.' Coley v. State*, 231 Ga., at 834, 204 S.E.2d, at 616. The court on another occasion stated that 'we view it to be our duty under the similarity standard to assure that *no death sentence is affirmed unless in similar cases throughout the state the death penalty has been imposed generally. . . .' Moore v. State*, 233 Ga. 861, 864, 213 S.E.2d 829, 832 (1975). See also *Jarrell v. State, supra*, at 425, 216 S.E.2d, at 270 (*standard is whether 'juries generally throughout the state have imposed the death penalty'*); *Smith v. State*, 236 Ga. 12, 24, 222 S.E.2d 308, 318 (1976) (found 'a clear pattern' of jury behavior)." *Gregg*, 428 U.S. at 204-05, 96 S.Ct. at 2940 (emphasis added).

In holding the Georgia capital-sentencing system constitutional on its face, the Supreme Court concluded:

> "The provision for appellate review in the Georgia capital-sentencing system serves as a check against the random or arbitrary imposition of the death penalty. In particular, the proportionality review substantially eliminates the possibility that a person will be sentenced to die by the action of an aberrrant jury. If a time comes when juries *generally do not impose* the death sentence in a certain kind of murder case, the appellate review procedures assure that no defendant convicted under such circumstances will suffer a sentence of death." *Gregg*, 428 U.S. at 206, 96 S.Ct. at 2940 (emphasis added).

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Article 27, § 414 (e), enacted in the wake of *Gregg*, is patterned after the proportionality review provision of the Georgia death penalty statute. *See* Ga. Code Ann. § 17-10-35 (c) (1982).[1] Section 414 (e) provides in pertinent part:

> "In addition to the consideration of any errors properly before the Court on appeal, the Court of Appeals shall consider the imposition of the death sentence. With regard to the sentence, the Court shall determine:
>
> . . .
>
> "(4) whether the sentence of death is excessive or disproportionate to the penalty imposed in *similar cases*, considering both the crime and the defendant." (Emphasis added.)

Manifestly, the purpose of that provision is to provide consistency and fairness in the imposition of the death penalty by assuring that the death penalty is not imposed unless it has been generally imposed in similar cases throughout the State.

This case involves a question of statutory construction. At issue is the meaning of the term "similar cases" appearing in § 414 (e) (4). The cardinal rule of statutory construction is to ascertain the actual intent of the Legislature. The primary source from which to determine the intention of the Legislature is the language of the statute. If the statutory language is ambiguous, the statute is to be construed reasonably and with reference to the purpose to be accomplished. *Scott v. State*, 297 Md. 235, 245-46, 465 A.2d 1126, 1132

1. § 17-10-35 (c) provides in pertinent part:

"With regard to the sentence, the court shall determine:

. . .

"(3) Whether the sentence of death is excessive or disproportionate to the penalty imposed in *similar cases*, considering both the crime and the defendant." (Emphasis added.)

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(1983); *State v. Loscomb*, 291 Md. 424, 429, 435 A.2d 764, 767 (1981); *Department of State Planning v. Mayor of Hagerstown*, 288 Md. 9, 14, 415 A.2d 296, 299 (1980). Finally, a penal statute must be strictly construed in favor of the accused. *State v. Canova*, 278 Md. 483, 496-97, 365 A.2d 988, 996 (1976); *Gatewood v. State*, 244 Md. 609, 617, 224 A.2d 677, 682 (1966); *Weinecke v. State*, 188 Md. 172, 176, 52 A.2d 73, 74 (1947). I shall apply these general rules of statutory construction here.

In enacting § 414 (e) (4), the General Assembly considered the scope of the inventory of cases necessary to assure effective proportionality review. Thus, in a letter dated 14 December 1977 from the Governor's Chief Legislative Officer to the General Assembly, it was said with respect to § 414 (e):

> "In addition to any other considerations properly before the Court, subsection (E) requires the Court to make four determinations regarding the death sentence. Those considerations require the court to view the evidence in light of each of the court's or jury's separate written decisions. Also required is a comparison of the penalty imposed in cases which are similar to the murder committed in the instant case and to the defendant who committed the crime. Unlike the Georgia statute, the Court is not limited to cases which occurred after a certain date. The Court is free to consider *any similar cases*, and it must refer to them in its decision." (Emphasis added.)

This legislative history[2] establishes that the General Assembly intended that the broadest possible inventory of similar cases be utilized in Maryland's proportionality review procedure.[3]

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2. In order to determine a statute's meaning, a court may consider the statute's legislative history. Scott, 297 Md. at 246, 465 A.2d at 1132; Loscomb, 291 Md. at 429, 435 A.2d at 767; Department of State Planning, 288 Md. at 14, 415 A.2d at 299.

3. Commentators have also recognized that the efficacy of proportionality review procedures depends upon the thoroughness and accuracy of

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Notwithstanding the General Assembly's intent that "any" similar cases be considered, the majority chooses to restrict the inventory of similar cases to "only those first degree murder cases in which the State sought the death penalty under § 413, whether it was imposed or not," and to exclude those "other death-eligible murder cases in which the prosecutor could have, but did not seek the death penalty." The majority, however, offers no affirmative justification for this exclusion.

In my view, "death-eligible murder cases in which the prosecutor could have, but did not seek the death penalty" are "similar cases" within the scope of § 414 (e) (4). In that section, the General Assembly expressly outlined the characteristics to be taken into account in proportionality review. There it stated that in determining whether the death penalty is disproportionate "both the crime and the defendant" should be considered.

With respect to the crime committed in this case, the distinguishing characteristics [4] are that Tichnell killed a police officer in an attempt to evade arrest. Moreover, with respect to the defendant in this case, the distinguishing characteristic is that Tichnell had not previously been found guilty of a crime of violence. Consequently, in determining what constitutes a case similar to this case, these distinguishing characteristics must be taken into account. Such distinguishing characteristics undoubtedly are present, not only in cases "in which the State sought the death penalty . . . whether it was imposed or not," but also in those "other death-eligible murder cases in which the prosecutor could have, but did not seek the death penalty." Under these circumstances, such cases should be included in the inventory.

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the review process. Hubbard, Burry, and Widener, *A "Meaningful" Basis for the Death Penalty: The Practice, Constitutionality, and Justice of Capital Punishment in South Carolina*, 34 S.C.L.Rev. 391, 443 (1982); Baldus, Pulaski, Woodworth, and Kyle, *Identifying Comparatively Excessive Sentences of Death: A Quantitative Approach*, 33 Stan.L.Rev. 1, 21 (1980-81).

4. Throughout this dissenting opinion, the term "distinguishing characteristic" refers to aggravating and mitigating circumstances found by the trier of fact. *See* Md. Code (1957, 1982 Repl.Vol., 1983 Cum.Supp.), Art. 27, § 413 (d) & (g).

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In my view, "death-eligible murder cases in which the prosecutor could have, but did not seek the death penalty" must be included in the inventory of relevant cases in order to achieve the goal of proportionality review — the consistent and fair application of the death penalty. Recently, in *Enmund v. Florida*, U.S. , , 102 S.Ct. 3368, 3379 (1982), the Supreme Court held that death was a disproportionate penalty for a felony murder in which the defendant, the driver of a get-away car, did not himself kill, attempt to kill, or intend that a killing take place. In reaching this result, the plurality[5] relied upon legislative judgments and sentencing decisions of juries, both of which were regarded as significant and reliable objective indices of contemporary standards of decency. *Enmund*, U.S. at , 102 S.Ct. at 3372-75. In response to the dissent,[6] the plurality said:

> "The dissent criticizes these statistics on the ground that they do not reveal the percentage of homicides that were charged as felony murders or the *percentage of cases where the State sought the death penalty* for an accomplice guilty of felony murder. We doubt whether it is possible to gather such information, and at any rate, *it would be relevant if prosecutors rarely sought the death penalty* for accomplice felony murder, for it would tend to indicate that prosecutors, who represent society's interest in punishing crime, consider the death penalty excessive for accomplice felony murder." *Enmund*, U.S. at , 102 S.Ct. at 3376 (emphasis added) (citation omitted).

In conclusion, the plurality said:

> "Although the judgments of legislatures, juries and *prosecutors* weigh heavily in the balance, it is for us ultimately to judge whether the Eighth

5. The prevailing opinion was authored by Justice White and joined by Justices Marshall, Blackmun, and Stevens. Justice Brennan filed a concurring opinion.

6. Justice O'Connor filed a dissenting opinion in which Chief Justice Burger and Justices Powell and Rehnquist joined.

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> Amendment permits imposition of the death penalty. . . ." *Enmund*, U.S. at , 102 S.Ct. at 3376 (emphasis added).

Thus, all nine Justices of the Supreme Court agreed that because the judgment of prosecutors constitutes an objective index of contemporary standards of decency, the fact that in certain circumstances prosecutors rarely seek the death penalty is relevant and should be considered in determining whether the death penalty is excessive or disproportionate.

Subsequent to *Enmund*, the Supreme Court of Georgia, in *Horton v. State*, 249 Ga. 871, 295 S.E.2d 281 (1982), interpreted the scope of the term "similar cases" appearing in the Georgia statute. The Court, citing *Enmund*, expressly noted:

> "We do compare cases as to which the death penalty could have been sought by the prosecutor but was not." *Horton*, 249 Ga. at 880 n.9, 295 S.E.2d at 289 n.9.

Consequently, the Supreme Court of Georgia determined, in essence, that "death-eligible murder cases in which the prosecutor could have, but did not seek the death penalty" are included in the inventory of cases utilized for proportionality review thus acknowledging that the exercise of prosecutorial discretion is relevant in determining whether the death penalty is excessive or disproportionate.[7]

Maryland's death penalty statute is patterned upon the Georgia statute. Thus, the Supreme Court of Georgia's interpretation of the term "similar cases" based upon the United States Supreme Court's analysis in *Enmund* is persuasive authority.[8] That interpretation supports the conclusion that

7. In *Castel v. State*, 250 Ga. 776, , n.12, 301 S.E. 2d 234, 250, 250 n.12 (1983), the Supreme Court of Georgia in its proportionality review included two cases in which the death penalty was not sought. *See* Muikey v. State, 250 Ga. 444, 298 S.E.2d 487 (1983); Reaves v. State, 242 Ga. 542, 250 S.E.2d 376 (1978).

8. In construing a Maryland statute patterned upon the statute of another state, the judicial decisions of that state, including those rendered after the Maryland enactment, are persuasive authority. James v. Prince George's County, 288 Md. 315, 330, 418 A.2d 1173, 1181 (1980); St. Joseph Hospital v. Quinn, 241 Md. 371, 376, 216 A.2d 732, 735 (1966); Zell v. Safe Deposit & Trust Co. of Baltimore, 173 Md. 518, 525, 196 A. 298, 301-02

in Maryland "death-eligible murder cases in which the prosecutor could have, but did not seek the death penalty" must be included in the relevant inventory of cases utilized for proportionality review.

For the first time, this Court has before it data concerning the exercise of prosecutorial discretion in death penalty cases.[9] This data dramatically demonstrates that the inventory of relevant cases for proportionality review must include all death-eligible murder cases — not only those in which the prosecutor sought the death penalty, but also those in which he did not.

This data reveals that in Maryland prosecutors seek the death penalty in only 7.8% of the death-eligible cases, whereas in 92.2% of the death-eligible cases the death penalty is not sought.[10] Consequently, this data establishes that Maryland prosecutors rarely seek the death penalty, a fact that is relevant, in and of itself, in determining whether the death penalty is disproportionate.

More important, the purpose of proportionality review is to assure that a person is not sentenced to death unless the death penalty has been imposed generally in similar cases throughout the State. *Gregg*, 428 U.S. at 205, 96 S.Ct. at 2940. If this purpose is to be effectuated, under § 414(e)(4), a person sentenced to death must have his background and the nature and the circumstances of the crime committed

9. An appellate court may take judicial notice of the record in other cases before it. Dean v. State, 291 Md. 198, 203, 434 A.2d 552, 555 (1981); Jeweler v. Potomac Electric Power Co., 217 Md. 458, 463, 144 A.2d 66, 68 (1958). Consequently, I take judicial notice of the record in *Calhoun v. State*, (No. 129, Sept. Term, 1981 & No. 5, Sept. Term, 1982), presently pending before this Court.

10. *See* Appendix I, No. 129, Sept. Term, 1981 and No. 5, Sept. Term, 1982, Calhoun v. State, Appendix to Supplemental Brief of Appellants, Vol. I, at 1, Statistical Summary of Record in *Calhoun v. State* Relating to Prosecutorial Discretion in Death Penalty Cases, Percentage of Qualifying Cases in which Capital Proceedings Held.

The term "qualifying cases," used in Appendix I refers to all death-eligible cases including not only those in which the prosecutor sought the death penalty, but also those in which he did not.

compared to the sentence imposed on other persons in this State of similar background who committed a similar crime under similar circumstances. That prosecutors do not seek the death penalty in 92.2% of death-eligible murder cases shows that unless all death-eligible cases are included in the inventory, a significant number of cases involving similar defendants and similar crimes would be excluded from proportionality review.

In addition, the data concerning the exercise of prosecutorial discretion reveals that in cases in which the death penalty has been sought juries in Garrett County have imposed the death penalty in 50% of the cases, whereas juries in Baltimore City have imposed the death penalty in 33%.[11] This data suggests that in these two jurisdictions the death penalty has been imposed in a somewhat consistent manner. The data further reveals, however, that in Maryland there is a substantial variation in the exercise of prosecutorial discretion. In Garrett County prosecutors seek the death penalty in 100% of the death-eligible cases, whereas in Baltimore City, they seek that penalty in only 1.8%.[12] This data further shows that when prosecutorial discretion is taken into account, juries in Garrett County have imposed the death penalty in 50% of all the death-eligible cases, whereas juries in Baltimore City have imposed the death penalty in only .6%.[13] Consequently, this data demonstrates that in these two jurisdictions the death penalty has been imposed in an inconsistent manner. If death-eligible cases in which the death penalty has not been sought are excluded from the inventory, a person who has committed a crime in Garrett County is deprived of a realistic comparison of the treatment accorded to other

11. *See* Appendix I, Capital Proceedings Held, Death Imposed.
12. *See* Appendix I, Percentage of Qualifying Cases in which Capital Proceedings Held.
13. *See* Appendix I, Percentage of Qualifying Cases in which Death was Imposed.

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persons of similar background who committed a similar crime under similar circumstances in Baltimore City and, indeed, throughout the State.

In my view, if all death-eligible cases are not included in the inventory, it is impossible conscientiously to determine whether the death penalty has been imposed generally in similar cases throughout the State. In essence, the majority's restriction of the inventory of cases to those in which the prosecutor has sought the death penalty makes it impossible, in a given case, to determine that the imposition of the death penalty is fair and consistent. Such a result is not consonant with the General Assembly's intent that the broadest possible inventory of similar cases be utilized in Maryland's proportionality review procedure. More important, such an interpretation is not consonant with the General Assembly's purpose of assuring consistent and fair application of the death penalty through proportionality review.

Moreover, the data concerning the exercise of prosecutorial discretion raises substantial constitutional questions concerning the majority's exclusion from proportionality review of death-eligible cases in which the prosecutor has not sought the death penalty. The majority, relying upon footnotes in *Gregg*, 428 U.S. at 204-05 n.56, 96 S.Ct. at 2940 n.56, and *Proffitt v. Florida* 428 U.S. 242, 259 n.16, 96 S.Ct. 2960, 2970 n.16 (1976), has determined that:

> "Implicit in [*Gregg* and *Proffitt*] is the conclusion that to include in the relevant inventory of cases only those in which the death penalty was sought does not violate the due process or cruel and unusual punishment provisions of the federal constitution."

Thus, the majority itself recognizes that in *Gregg* and *Proffitt* the Supreme Court did not explicitly hold that it is

constitutional to restrict the inventory of cases to those in which the death penalty was sought.

In *Gregg* and *Proffitt* the Supreme Court considered only the facial constitutionality of the Georgia and Florida death penalty statutes. These cases were decided by a plurality of the Court.[14] In a concurring opinion in *Gregg*, Justice White articulated the view that prosecutorial discretion need not be taken into account in proportionality review. There Justice White said:

> "Petitioner also argues that decisions made by the prosecutor — either in negotiating a plea to some lesser offense than capital murder or in simply declining to charge capital murder — are standardless and will inexorably result in the wanton and freakish imposition of the penalty condemned by the judgment in *Furman*. I address this point separately because the cases in which no capital offense is charged escape the view of the Georgia Supreme Court and are not considered by it in determining whether a particular sentence is excessive or disproportionate.
>
> "Petitioner's argument that prosecutors behave in a standardless fashion in deciding which cases to try as capital felonies is unsupported by any facts. Petitioner simply asserts that since prosecutors have the power not to charge capital felonies they will exercise that power in a standardless fashion. This is untenable. Absent facts to the contrary, it cannot be assumed that prosecutors will be motivated in their charging decision by factors other than the strength of their case and the likeli-

14. The prevailing opinions in both *Gregg* and *Proffitt* were joined by Justices Stewart, Powell, and Stevens. Chief Justice Burger and Justices White and Rehnquist, in a separate opinion, concurred in the judgments of the Court. Justice Blackmun separately concurred in the judgments of the Court. Justices Brennan and Marshall each separately dissented.

> hood that a jury would impose the death penalty if it convicts. Unless prosecutors are incompetent in their judgments, the standards by which they decide whether to charge a capital felony will be the same as those by which the jury will decide the questions of guilt and sentence. Thus defendants will escape the death penalty through prosecutorial charging decisions only because the offense is not sufficiently serious; or because the proof is insufficiently strong. This does not cause the system to be standardless any more than the jury's decision to impose life imprisonment on a defendant whose crime is deemed insufficiently serious or its decision to acquit someone who is probably guilty but whose guilt is not established beyond a reasonable doubt. *Thus the prosecutor's charging decisions are unlikely to have removed from the sample of cases considered by the Georgia Supreme Court any which are truly 'similar.' If the cases really were 'similar' in relevant respects, it is unlikely that prosecutors would fail to prosecute them as capital cases; and I am unwilling to assume the contrary.*" *Gregg*, 428 U.S. at 224-25, 96 S.Ct. at 2949 (White J., concurring) (emphasis added).

Manifestly, Justice White's view is premised upon the assumption, unsupported by facts, that there is no significant variation in the exercise of prosecutorial discretion and consequently that prosecutorial discretion has no impact upon proportionality review. The data before this Court for the first time provides facts concerning the exercise of prosecutorial discretion. This data demonstrates a substantial variation, ranging from 1.8% to 100%, in the percentage of cases in which the death penalty is sought, depending upon the identity of the prosecutor making the determination.[13] Equally important, this data shows that there is a substan-

13. *See* Appendix I, Percentage of Qualifying Cases in which Capital Proceedings Held.

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tial variation in the standards employed by prosecutors in deciding in which cases to seek the death penalty.[16] In six counties, the prosecutors exercise virtually no discretion; these prosecutors seek the death penalty whenever a single aggravating circumstance is present and mitigating circumstances are not taken into account. In six other counties and Baltimore City, prosecutors exercise considerable discretion. Such prosecutors weigh the aggravating circumstances against the mitigating circumstances in determining whether to seek the death penalty. There are many other variations in the standards employed by prosecutors. In some jurisdictions the strength of the case is evaluated. Sometimes the question whether a jury would impose the death penalty is considered. In Baltimore City the death penalty is sought if there is a substantial likelihood that the jury would impose death. In Montgomery County, the death penalty is sought if there is a reasonable possibility. In Charles County, the death penalty is sought unless it is very unlikely that the jury will impose that penalty. In two counties, the prosecutors take public sentiment with respect to the case into account, whereas in seven others, they do not. In five counties, prosecutors take the relationship between the accused and the victim into account, whereas in three others they do not. In one county, the prosecutor considers the burden of prosecuting a death penalty case upon the State's Attorney's office and the courts, whereas in seven other counties, they do not. A prosecutor in one county seeks the death penalty as a device to obtain a plea bargain, whereas the prosecutors in no other county engage in such a practice. In a single county, the prosecutor seeks the death penalty in felony murder cases only when the aggravating circumstances are separate and distinct from the underlying felony, whereas no prosecutor in any other county has such a policy. Finally, the data before this Court shows that when six prosecutors were asked the hypothetical question whether they would seek the death penalty in a case involving a fourteen-year-old charged with felony murder,

16. *See* No. 129, Sept. Term, 1981 and No. 5, Sept. Term, 1982 Calhoun v. State, Joint Record Extract, Vol. IV.

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three responded that they would and three responded that they would not.

Manifestly, Justice White's assumption that the standards employed by prosecutors in Georgia will be consistent and that "if the cases really were 'similar' in relevant respects, it is unlikely that prosecutors would fail to prosecute them as capital cases" may not be well-founded. *See Gregg*, 428 U.S. at 225, 96 S.Ct. at 2949 (White, J., concurring). Under these circumstances, the impact upon the Supreme Court of data similar to that before this Court cannot be assessed. It is, nonetheless, apparent that the existence of such data raises the question whether the relevant inventory of cases must include those in which the death penalty was not sought in order for proportionality review to be constitutional.

Subsequent to *Gregg*, in *Enmund*, all nine Justices of the Supreme Court agreed that the fact that prosecutors rarely seek the death penalty is relevant and should be considered in determining whether the death penalty is excessive or disproportionate. *Enmund* did not involve the question of the scope of the relevant inventory of cases necessary for constitutional proportionality review. Nonetheless, it suggests that the existence of data similar to that before this Court, indicating that prosecutors rarely seek the death penalty, and that there is significant variation in the standards employed and the percentage of cases in which the death penalty is sought, raises the question whether the relevant inventory of cases must include those in which the death penalty was not sought in order for proportionality review to be constitutional. Indeed, subsequent to *Enmund*, the Supreme Court of Georgia interpreted the scope of the term "similar cases" as including those in which the death penalty could have been sought by the prosecutor but was not. *Horton*, 249 Ga. at 880 n.9, 295 S.E.2d at 289 n.9.

Under these circumstances, it is clear that the majority's construction of § 414(e)(4), restricting the relevant inventory of cases to those in which the prosecutor has sought the death penalty and excluding those death-eligible cases in

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which the prosecutor has not, raises serious doubts as to its constitutionality. Such a construction should be avoided.[17]

I am cognizant of the majority's statement that "we do not preclude any defendant whose death sentence is under appellate review from presenting argument, with relevant facts, that designated non-capital murder cases are similar to the case then under scrutiny and should be taken into account in the exercise of our proportionality review function." I do not agree, however, with the members of this Court who concur with the majority's result in this case that the majority's construction of § 414 (e) (4) "becomes academic and of little or no practical consequence," in light of the Court's expressed willingness "to consider murder cases in which the State did not seek the death penalty, and which are brought to the Court's attention by the defendant."

In essence, after determining that the relevant inventory excludes death-eligible cases in which the death penalty has not been sought, the majority affords the defendant the right to argue that certain such cases should nonetheless be taken into account. Affording a defendant such a right does not eliminate the fatal defect inherent in the proportionality review procedure prescribed by the majority. The fact that a defendant is afforded a right to argue that something should be included in the relevant inventory does not mean that it will be. Thus, although the majority permits death-eligible cases in which the death penalty has not been sought to be taken into account, it does not require the consideration of all death-eligible cases. Consequently, the relevant inventory of cases remains restricted to those in which the death penalty has been sought and continues to exclude all death-eligible cases in which the death penalty has not been sought. In short, in my view, the majority's statement does nothing more than afford the defendant the right to argue

17. A construction of a statute, giving rise to doubts as to its constitutionality, should be avoided. Davis v. State, 284 Md. 370, 377, 451 A.2d 107, 111 (1982); Baltimore County v. Missouri Realty, Inc., 219 Md. 153, 159, 148 A.2d 424, 427 (1959); Barrett v. Clark, 189 Md. 116, 127, 54 A.2d 128, 133 (1947).

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that certain cases excluded from the inventory today should be included and considered tomorrow.

Additionally, even if death-eligible cases designated by the defendant in which the death penalty was not sought were to be taken into account, the fatal defect inherent in the proportionality review procedure prescribed by the majority would not be eliminated. Under such circumstances, as a practical matter, there would still be no assurance that *all* similar death-eligible cases in which the death penalty has not been sought would be considered in determining whether the imposition of the death penalty is fair and consistent. Only cases of which the defendant has become aware would be considered.

In my view, it is the responsibility of this Court to assure that *all* death-eligible cases in which the death penalty has not been sought, to be utilized in proportionality review, be included in the inventory. Like Judge Eldridge, the Supreme Court has recognized the enormous difficulty associated with gathering data concerning the exercise of prosecutorial discretion. *See Enmund*, U.S. at , 102 S.Ct. at 3376. The responsibility to accumulate such data should not be foisted upon the defendant. This is particularly true, in a case such as this in which the defendant is represented by retained counsel who does not necessarily have available even the limited statistical data available to the Public Defender.

In short, the majority has determined that in proportionality review all similar cases in which the death penalty has been sought are relevant. It has assumed the responsibility, through its rule-making powers, to develop an inventory of all death-eligible cases in which the death penalty has been sought from which relevant similar cases may be culled. The majority then belatedly indicates that similar death-eligible cases in which the death penalty was not sought may be relevant. Nevertheless, without explanation, and without any attempt to adopt a rule such as that suggested by Judge Cole, or any other rule, the Court refuses to develop an inventory of all death-eligible cases in which the

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death penalty has not been sought from which relevant similar cases may be culled. Unlike Judge Cole, I am not willing to assume that in the absence of a Court rule "various prosecutors will maintain . . . a data bank which they will readily make available to defense counsel, public or private." Under the present circumstances, there is no justification whatsoever for the majority arbitrarily to shift this Court's responsibility to the defendant and to impose upon him a task which is difficult, if not impossible, to perform.

In sum, in my view, under § 414 (e) (4), the inventory of cases utilized for proportionality review must include not only those death-eligible cases in which the prosecutor has sought the death penalty, whether it was imposed or not, but all those death-eligible cases in which the prosecutor did not seek the death penalty. Such a construction is supported by the legislative history of § 414 (e) (4), is consonant with the legislative intent that the broadest possible inventory of similar cases be utilized in Maryland's proportionality review procedure, avoids serious constitutional questions, and prevents the arbitrary imposition of an unjustified burden upon the defendant. Most important, such an interpretation effectuates the purpose of proportionality review — to assure consistent and fair application of the death penalty — and, therefore, is favorable to the accused. I agree with Judge Seiler who in a dissenting opinion in *State v. Mercer*, 618 S.W.2d 1, 21 (Mo. 1981) (Seiler, J., dissenting) stated:

> "By 'similar cases' is meant similar capital murders, not limited only to those where both death and life imprisonment were submitted to the jury and then affirmed on appeal, whichever way the case went on punishment. The evil dwed is the murder and what accompanied it and that, as well as the defendant, is what must be looked at in comparing what one defendant received in punishment under a capital murder charge with what another received. The fact . . . *that the state waived the death penalty in* [a capital murder defendant's]

> case . . . *does not mean that we can ignore his case in making our comparison.* Once we accept the idea, as we must, that the death penalty cannot be inflicted at random, or arbitrarily or inconsistently, then necessarily we must take into consideration all capital murders we know about." (Emphasis added.)

II

Even if I agreed with the majority that under § 414 (e) (4) the relevant inventory of similar cases is restricted to "first degree murder cases in which the State sought the death penalty . . . whether it was imposed or not," I would not agree with the majority's conclusion "that the death sentence imposed upon Tichnell was neither excessive nor disproportionate to the penalty imposed in similar cases in Maryland, considering both the crime and the defendant."

This is the first case in which this Court has engaged in proportionality review in order to determine whether a death penalty is excessive or disproportionate. It is, therefore, important that the process be defined.

The Eighth Amendment concept of proportionality involves more than merely a measure of contemporary standards of decency. It also requires that the magnitude of the punishment imposed be related not only to the degree of harm inflicted on the victim, but also to the degree of the defendant's moral culpability. *Enmund*, U.S. at , 102 S.Ct. at 3386, 3390-91 (O'Connor, J., dissenting). The General Assembly has imposed the responsibility of determining whether a death penalty is excessive or disproportionate upon this Court. The aggravating and mitigating circumstances established by the General Assembly represent a legislative judgment that each of those characteristics affects the moral culpability attributable to persons who commit crimes. In making our legislatively mandated comparison, this Court must take each of the relevant distinguishing characteristics into

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account. The General Assembly further directs this Court, after comparing all of the distinguishing characteristics present in similar cases, to determine whether the defendant in a given case warrants the death penalty. Such a determination requires this Court, utilizing all of the applicable legislative judgments with respect to moral culpability, to decide in essence whether a defendant's moral culpability is closer to the moral culpability attributable to those sentenced to death or to those sentenced to life imprisonment. Manifestly, a comparison between the degree of moral culpability attributable to a given defendant in a given case, and that attributable to other similar defendants in similar cases is the core of proportionality review.

In considering whether a death penalty is excessive or disproportionate, it is necessary to determine whether in similar cases the death penalty is generally imposed throughout the State. Thus, it is necessary to show that the degree of moral culpability attributable to the defendant is at least as great as that attributable to others in similar cases sentenced to death. If it is questionable whether the defendant's moral culpability is at least as great as that of others sentenced to death, the focus of proportionality review necessarily shifts from a determination of whether in similar cases the death penalty has been generally imposed throughout the State, to whether the defendant's moral culpability so far exceeds that of others in similar circumstances sentenced to life imprisonment that the imposition of the death penalty is justified.

Thus, the process of proportionality review demands the striking of the most delicate balances — balances about which reasonable persons may differ. Consequently, it is necessary to proceed with the utmost caution and the greatest care, for in the final analysis, at stake is the delicate balance between the life and death of a human being.

One difficulty inherent in the proportionality review process, acknowledged by the majority, is the selection of similar cases from the relevant inventory of cases. The majority recognizes "that dissimilarities exist between Tichnell's case

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and those selected for comparative review." It laments that "these cases, as well as others in the inventory, are not more similar to Tichnell's case." Notwithstanding these inadequacies in the inventory, the majority feels compelled to "complete the comparative review process mandated by § 414 (e) (4)." In so doing, it has determined that there are only five similar cases in the inventory. As a result, the majority has failed to take into account a number of similar cases considering both the crime and the defendant. In my view, there are ten cases in the inventory having distinguishing characteristics similar to those in this case that should be considered here,[18] three of which are considered by the majority.[19]

In order to determine whether under § 414 (e) (4) the imposition of the death penalty is excessive or disproportionate, it is necessary to compare similar cases considering both the crime and the defendant. With respect to the circumstances of the crime in this case, the record shows that at approximately 5:25 a.m., Tichnell and a confederate broke into a store for the purpose of stealing guns. The store was not then open and nobody was present. Tichnell's departure from the scene was interrupted by a deputy sheriff whom he shot and killed. When the police discovered the deputy sheriff, he was lying face down near the store. He had been shot seven times and was dead. Of the

18. *See* State v. Harris, Criminal Case No. 75400, Circuit Court for Baltimore County, filed 9-6-83; State v. Monroe, Criminal No. 26242, Circuit Court for Montgomery County, filed 12-9-82; State v. Johnson, CT 82-377, Circuit Court for Prince George's County, filed 12-1-82; State v. Green, Ind. No. 18108220-22, Criminal Court for Baltimore City, filed 7-12-82; State v. White, Criminal No. 75226, Circuit Court for Baltimore County, filed 5-19-82; State v. Hughes, Criminal No. 23917, Circuit Court for Montgomery County, filed 4-13-82; State v. Calhoun, Criminal No. 26250, Circuit Court for Montgomery County, filed 12-21-81; State v. Colvin, Criminal No. 25,349, Circuit Court for Anne Arundel County, filed 9-30-81; State v. Stebbing, Criminal Case No. 7681, Circuit Court for Harford County, filed 6-2-81; State v. Porter, Criminal No. 22,551, Circuit Court for Anne Arundel County, filed 1-2-81.

Unless otherwise expressly indicated, throughout this dissenting opinion citations to cases in the inventory refer to the Reports of Trial Judges, filed in this Court. *See* Appendix A to the majority opinion.

19. *See* Calhoun, Monroe, and Hughes.

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seven shots, two were fatal — one in the lower back and one in the back of the head.

With respect to the crime committed in this case, the distinguishing characteristics are that Tichnell killed a police officer in an attempt to evade arrest. Moreover, with respect to the defendant in this case, the record shows that the distinguishing characteristic is that Tichnell had not previously been found guilty of a crime of violence.[20] Consequently, in determining what constitutes a case similar to this case, these distinguishing characteristics must be taken into account.

The majority has considered only one case in which the death penalty was imposed, *Calhoun*, Criminal No. 26250, Circuit Court for Montgomery County, filed 12-21-81. The comparative distinguishing characteristics in that case are that a police officer was killed while the defendant was attempting to evade arrest. The judgment in *Calhoun*, however, is presently pending on appeal.[21] More important, unlike *Tichnell*, in which a police officer was killed during the course of a storehouse breaking, in *Calhoun*, the police officer was killed during the course of a robbery. This distinction is significant because there is a difference in quality between the crimes of robbery and storehouse breaking.

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20. Art. 27, § 413 (g) (1) establishes as a mitigating circumstance that the defendant has not previously been found guilty of a crime of violence. This section provides in pertinent part.

> "As used in this paragraph, 'crime of violence' means abduction, arson, escape, kidnapping, manslaughter, except involuntary manslaughter, mayhem, murder, robbery, or rape or sexual offense in the first or second degree, or an attempt to commit any of these offenses, or the use of a handgun in the commission of a felony or another crime of violence."

Throughout this dissenting opinion, the phrase "crime of violence" is defined as it is in § 413 (g) (1).

The record additionally shows that Tichnell had not previously been found guilty of any other crime. Moreover, the record shows that Tichnell had been married, had a dependent child, had served in the military for several years, and had been employed at a steel mill until approximately one year before the crime. Although none of these characteristics were found to be mitigating circumstances in *Tichnell*, some of them were found to be mitigating circumstances in another case in the inventory. *See* Monroe.

21. One of the grounds in Calhoun's pending appeal is that during the sentencing proceeding the jury took impermissible considerations into account in determining whether to impose the death penalty.

Robbery involves the taking of property from a person, whereas storehouse breaking involves the taking of property from a place. Based upon this difference, the General Assembly has determined that a killing during the course of a robbery constitutes an aggravating circumstance, § 413 (d) (10), that justifies the imposition of the death penalty, whereas a killing during the course of a storehouse breaking does not. Thus, the General Assembly has expressed its legislative judgment that the degree of moral culpability attributable to a person who kills during the course of a robbery exceeds that attributable to a person who kills during the course of a storehouse breaking. Moreover, although Calhoun's "background" [22] was found to be a mitigating circumstance, unlike Tichnell, he had repeatedly

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It should be noted that until the instant case, this Court has not upheld a challenged death penalty in any of the nine consecutive cases decided since the enactment of Art. 27, §§ 413-415. *See* Scott v. State, 297 Md. 235, 465 A.2d 1126 (1983); Foster v. State, 297 Md. 191, 464 A.2d (1983); Harris v. State, 295 Md. 329, 455 A.2d 979 (1983); Poole v. State, 295 Md. 167, 453 A.2d 1218 (1983); Huffington v. State, 295 Md. 1, 452 A.2d 1211 (1982); Johnson v. State, 292 Md. 405, 439 A.2d 542 (1982); Poole v. State, 290 Md. 114, 428 A.2d 434 (1981); Tichnell v. State, 290 Md. 43, 427 A.2d 991 (1981); Tichnell v. State, 287 Md. 695, 415 A.2d 830 (1980).

Similarly, the United States Supreme Court has upheld only one challenged death penalty in fourteen of the fifteen cases decided since *Gregg*. *See* Enmund, U.S. at n.23, 102 S.Ct. at 3384 n.23 (1982) (O'Connor, J., dissenting). The death penalty was not upheld in *Enmund*, U.S. at , 102 S.Ct. at 3368; *Eddings v. Oklahoma*, 455 U.S. , 102 S.Ct. 869 (1982); *Estelle v. Smith*, 451 U.S. 454, 101 S.Ct. 1866 (1981); *Bullington v. Missouri*, 451 U.S. 430, 101 S.Ct. 1852 (1981); *Adams v. Texas*, 448 U.S. 38, 100 S.Ct. 2521 (1980); *Beck v. Alabama*, 447 U.S. 625, 100 S.Ct. 2382 (1980); *Godfrey v. Georgia*, 446 U.S. 420, 100 S.Ct. 1759 (1980) (plurality opinion); *Green v. Georgia*, 442 U.S. 95, 99 S.Ct. 2150 (1979) (per curiam); *Bell v. Ohio*, 438 U.S. 637, 98 S.Ct. 2977 (1978) (plurality opinion); *Lockett v. Ohio*, 438 U.S. 586, 98 S.Ct. 2954 (1978) (plurality opinion); *Coker v. Georgia*, 433 U.S. 584, 97 S.Ct. 2861 (1977) (plurality opinion); *Roberts v. Louisiana*, 431 U.S. 633, 97 S.Ct. 1993 (1977) (per curiam); *Gardner v. Florida*, 430 U.S. 349, 97 S.Ct. 1197 (1977) (plurality opinion); *Davis v. Georgia*, 429 U.S. 122, 97 S.Ct. 399 (1977) (per curiam). The death penalty was upheld in *Dobbert v. Florida*, 432 U.S. 282, 97 S.Ct. 2290 (1977).

22. In *Calhoun* the jury found:

> "that a substantial mitigating factor is the defendant's background, which has been such that he has never been integrated into society. Therefore, he has been and is unable to conform with its norms and moral values."

C.75

been found guilty of crimes of violence.[23] This distinction is important too because the General Assembly has frequently asserted that the degree of moral culpability attributable to a recidivist exceeds that attributable to a first-time offender and that a recidivist who commits a crime warrants more severe punishment than a first-time offender who commits the same crime under similar circumstances. *See, e.g.*, Md. Code (1957, 1982 Repl.Vol., & 1983 Cum.Supp.), Art. 27, §§ 293, 366, 558, and 643B.[24] In light of this State's public policy, I can only conclude that the degree of moral culpability attributable to a person of Calhoun's background, who has repeatedly been found guilty of crimes of violence and who kills a police officer during the course of a robbery, exceeds that of a first-time offender who kills a police officer during the course of a storehouse breaking. Manifestly, the imposition of the death penalty in *Calhoun* does not establish that the death penalty is generally imposed throughout the State in cases such as Tichnell's. Consequently, it is necessary to look further.

The majority itself recognizes that the *Calhoun* case is insufficient to justify the imposition of the death penalty in this case. Consequently, the majority considers four additional cases that in its view have comparative distinguishing characteristics. In each of these cases life imprisonment was imposed. As a result, the focus of the

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23. Calhoun was convicted of armed robbery in 1971; armed robbery in 1972; armed robbery in 1978; and two armed robberies in 1979.

Additionally, the record shows that Calhoun, unlike Tichnell, had never served in the military and had no dependent children.

24. Section 293 (a), with respect to certain crimes involving controlled dangerous substances, provides:

> "Any person convicted of any offense under this subheading is, if the offense is a second or subsequent offense, *punishable by a term of imprisonment twice that otherwise authorized*, by twice the fine otherwise authorized, or by both." (Emphasis added.)

Section 366 provides for enhanced punishment for recidivists with respect to crimes relating to lotteries. Section 558 provides enhanced punishment for recidivists with respect to certain crimes relating to theft. Section 643B provides for enhanced punishment for recidivists with respect to crimes of violence.

majority's proportionality review necessarily shifts from a determination of whether in similar cases the death penalty has been generally imposed throughout the State, to whether Tichnell's moral culpability so far exceeds that of others in similar circumstances sentenced to life imprisonment that the imposition of the death penalty is justified.

Of the four life imprisonment cases considered by the majority, two are cases in which the comparative distinguishing characteristic is that a police officer was killed. In my view, neither of these cases should be considered here. In *Sails*, CT 82-352, Circuit Court for Prince George's County, filed 5-24-83, the defendant during the course of a robbery repeatedly shot and ultimately killed a police officer in an effort to avoid arrest. A defense psychiatrist testified that Sails had an antisocial personality and that at the time of the murder he lacked substantial capacity to conform his conduct to the requirements of law. The defendant testified that a short time before the robbery he had taken a "speedball," a mixture of heroin and cocaine, and also had smoked some marijuana. One of the mitigating circumstances found was that at the time of the murder the defendant's capacity was substantially impaired. In my view, a defendant whose capacity was substantially impaired at the time of the commission of the crime is so significantly different from a defendant whose capacity was not impaired, that cases in which such dissimilarities exist are not comparable. For this reason, the *Sails* case is not similar to the *Tichnell* case and should not be considered here.[23]

In *Recek*, 5254 Criminal Trial, Circuit Court for Washington County, filed 3-24-80, the remaining case in which the comparative distinguishing characteristic is that a police officer was killed, the defendant, who was Tichnell's accomplice, was sentenced to life imprisonment. There was

23. Even if the *Sails* case were considered, I would find that while Tichnell's moral culpability was greater than that of Sails, it is questionable whether Tichnell's moral culpability so far exceeds that of Sails that the imposition of the death penalty is justified.

C.77

evidence to show, however, that Recek was not a principal in the first degree in the killing of the police officer, and the jury's verdict sheet makes clear that it did not believe that Recek was a principal in the first degree. Under these circumstances, Recek was not subject to the death penalty. *See* § 413 (e) (1). Thus, the *Recek* case is not similar to the *Tichnell* case and should not be considered here.

In any event, the majority itself recognizes that it is not possible to justify the imposition of the death penalty on the sole basis of the three cases upon which it relies in which the comparative distinguishing characteristic is that a police officer was killed. Accordingly, the majority seeks other cases that have other comparative distinguishing characteristics. There are twenty-two cases in the majority's inventory in which the comparative distinguishing characteristic is that a person other than a police officer was killed during the course of a robbery.[26] I agree with the majority that eight of those cases should not be considered here.[27] With respect to the remaining fourteen cases, the majority, without explanation, determines that only two are similar to this case. In both of these cases, the defendants were sentenced to life imprisonment.

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26. This is the first case in which this Court has engaged in proportionality review. In view of the limited number of cases available for comparison in which a police officer was killed, I agree with the majority that it is necessary to compare the *Tichnell* case to cases in which the comparative distinguishing characteristic is that an individual other than a police officer was killed during the course of a robbery. It is possible that at some future time the inventory of cases in which the distinguishing characteristic is that a police officer was killed will unfortunately be larger. Thus, there may come a time when comparisons to cases such as Tichnell's may appropriately be limited to cases in which the distinguishing characteristic is that a police officer was killed.

27. In three of the eight cases, the judgment of the trial court was reversed. Foster v. State, 297 Md. 191, 464 A.2d 986 (1983); Huffington v. State, 295 Md. 1, 452 A.2d 1211 (1982); Poole v. State, 290 Md. 114, 428 A.2d 434 (1981). In three others, the death penalty was vacated and the case was remanded for a new sentencing proceeding. Scott v. State, 297 Md. 233, 465 A.2d 1126 (1983); Harris v. State, 295 Md. 329, 455 A.2d 979 (1983); Poole v. State, 295 Md. 167, 453 A.2d 1218 (1983) One case was remanded to the trial court with directions to vacate the conviction and sentence and dismiss the indictment. Thomas v. State, 294 Md. 625, 451 A.2d 929 (1982).

In the remaining case, the death sentence was vacated by the trial court and a new sentencing proceeding is pending. State v. Johnson, Criminal No. 8796, Circuit Court for Harford County, filed 5-5-83.

C. 78

In *Monroe*, Criminal No. 26242, Circuit Court for Montgomery County, filed 12-9-82, the defendant, an accomplice of Calhoun's, shot and killed an alarm technician during the course of a robbery in an effort to avoid apprehension. Unlike Tichnell, however, Monroe had previously been found guilty of a crime of violence.[28] Nevertheless, the trial court found as a mitigating circumstance that it was unlikely that Monroe would engage in further criminal activity. Additional mitigating circumstances found were that Monroe had previously been employed, had two children,[29] and since his incarceration had made efforts to further his education. In my view, whether the degree of moral culpability attributable to Tichnell, a first-time offender who killed a police officer, exceeds the degree of moral culpability attributable to Monroe, a recidivist who killed a person other than a police officer, is questionable and, therefore, insufficient to justify the imposition of the death penalty.

In *Hughes*, Criminal No. 25917, Circuit Court for Montgomery County, filed 4-13-82, the defendant killed a person other than a police officer during the course of a robbery. The defendant had not previously been found guilty of a crime of violence and "other" mitigating circumstances were found. The "other" mitigating circumstances, however, were not specified by the jury. Although the comparative distinguishing characteristic that a person other than a police officer was killed during the course of a robbery was present, the crime committed was of a somewhat different quality from that committed by Tichnell. Tichnell set out to steal some guns from a store at a time when no one would be present. In contrast, in *Hughes*, recognized by the majority as being "the least similar of the cases reviewed," the

28. Monroe was previously convicted of robbery.

29. These two distinguishing characteristics were present in Tichnell's case but were not found to be mitigating circumstances.

C. 79

defendant set out in broad daylight to gun down and rob the manager of a restaurant who was on his way to deposit the weekend's receipts of approximately $25,000. Accordingly, it is questionable whether the degree of moral culpability attributable to Tichnell exceeds the degree of moral culpability attributable to Hughes.

Monroe and *Hughes*, the two cases relied upon by the majority in which a person other than a police officer was killed during the course of a robbery, do not justify the imposition of the death penalty in this case. Consequently, it is necessary to look further.

The majority's inventory contains twelve additional cases in which the comparative distinguishing characteristic is that a person other than a police officer was killed during the course of a robbery. In four of these cases, arbitrarily excluded from consideration by the majority, the death penalty was imposed, while life imprisonment was imposed in eight.

In *Harris*, Criminal Case No. 75400, Circuit Court for Baltimore County, filed 9-6-83, during the course of a robbery in a store, the defendant shot the victim, the sole employee present, six times. The defendant had previously been found guilty of a crime of violence.[30] In my view, it is questionable whether the degree of moral culpability attributable to a first-time offender who during the course of a storehouse breaking kills a police officer is as great as that attributable to a recidivist who during the course of a robbery kills a person other than a police officer. Under these circumstances, the imposition of the death penalty in *Harris* does not, in and of itself, establish that the death penalty is generally imposed throughout the State in cases such as Tichnell's. Consequently, it is necessary to look further.

In *Colvin*, Criminal No. 25,349, Circuit Court for Anne Arundel County, filed 9-30-81, the defendant during the course of a robbery stabbed the victim twenty-eight times in

30. Harris was convicted of robbery in 1977.

her throat. The defendant had previously been found guilty of a crime of violence.[31] In my view, the moral culpability of a recidivist who during the course of a robbery commits a murder in a brutal and heinous manner exceeds that of a first-time offender who during the course of a storehouse breaking kills a police officer when unexpectedly threatened with apprehension. Manifestly, the imposition of the death penalty in *Colvin* does not establish that the death penalty is generally imposed throughout the State in cases such as Tichnell's.

In *Stebbing*, Criminal Case No. 7681, Circuit Court for Harford County, filed 6-2-81, the defendant strangled a woman who at the time was being raped by the defendant's husband and thereafter stole the woman's personal possessions.[32] The following day the defendant and her husband dumped the victim's partially nude body into a sewer. The defendant had not previously been found guilty of a crime of violence.[33] In light of the brutal and heinous manner in which the crime was committed, the imposition of the death penalty in *Stebbing* does not establish that the death penalty is generally imposed in cases such as Tichnell's.

In *White*, Criminal No. 75226, Circuit Court for Baltimore County, filed 5-19-82, the defendant shot the victim who at the time was riding a moped that the defendant was attempting to steal. The defendant had not previously been found guilty of a crime of violence. An additional mitigating

31. Colvin was convicted of robbery with a deadly weapon in 1972.

The record additionally shows that Colvin was convicted of six burglaries in 1960; burglary in 1962; larceny in 1964; burglary in 1964; storehouse breaking in 1969; two assaults in 1973; larceny in 1973; and burglary in 1981. Additionally, the record shows that Colvin had not served in the military.

32. I recognize that in *Stebbing* the robbery was incidental to the rape. Nevertheless, in this first exercise of proportionality review, caution requires that *Stebbing* be included because it contains the comparative distinguishing characteristic that a person other than a police officer was killed during the course of a robbery.

33. The record additionally shows that Stebbing was convicted of larceny in 1979.

C. 81

circumstance, "environment," was found. Although the jury imposed the death penalty, the trial court in its report to this Court determined that the imposition of the death penalty was "questionable." Under these circumstances, the imposition of the death penalty in *White* can hardly be regarded as establishing that in circumstances similar to those in *White* the death penalty is generally imposed throughout the State and most assuredly cannot be regarded as establishing that the death penalty is generally imposed throughout the State in cases such as Tichnell's.

Harris, *Colvin*, *Stebbing*, and *White*, four cases presently pending on appeal in which the death penalty was imposed, neither singly nor collectively, are sufficient to justify the imposition of the death penalty in this case. Consequently, it is necessary to look further.

In all of the remaining eight cases, in which the comparative distinguishing characteristic is that a person other than a police officer was killed during the course of a robbery, the sentence of life imprisonment was imposed. I agree with the majority that five of these cases are not similar to the instant case.[34] With respect to the remaining three cases, arbitrarily excluded from consideration by the majority, the focus of proportionality review necessarily shifts from a determination of whether in similar cases the death penalty had been generally imposed throughout the State, to whether Tichnell's moral culpability so far exceeds that of others in similar cases sentenced to life imprisonment that the imposition of the death penalty is justified.

In *Porter*, Criminal No. 22,551, Circuit Court for Anne Arundel County, filed 1-2-81, during the course of a robbery,

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34. In four of these cases, the mitigating circumstance of substantially impaired capacity was found. *See* Allen, Criminal No. 26,323, Circuit Court for Anne Arundel County, filed 3-21-83; Johnson, Criminal No. 76415, Circuit Court for Baltimore County, filed 5-12-82; Miller, Criminal Trial 2346, Circuit Court for Allegany County, filed 12-9-81; Mayers, Criminal No. 23,921, Circuit Court for Anne Arundel County, filed 11-3-80. In one case, the robbery conviction was reversed by the Court of Special Appeals in an unreported per curiam opinion. *See* Quickley v. State, (No. 383, September Term, 1981, filed 17 December 1981).

the defendant shot and killed a gas station attendant who at the time of the shooting was in a kneeling position. The defendant had not previously been found guilty of a crime of violence and it was found unlikely that he would engage in further criminal activity.[35] In my view, whether the degree of moral culpability attributable to Tichnell, who during the course of a storehouse breaking killed a police officer when unexpectedly threatened with apprehension, exceeds the degree of moral culpability attributable to Porter, who during the course of a robbery deliberately executed an innocent victim, is questionable and, therefore, insufficient to justify the imposition of the death penalty. Consequently, it is necessary to look further.

In the two remaining cases in which the comparative distinguishing characteristic is that a person other than a police officer was killed during the course of a robbery, Tichnell's moral culpability was, in my view, less than that of each of the defendants who were sentenced to life imprisonment, not death. In *Green*, Ind. No. 18108220-22, Criminal Court of Baltimore City, filed 7-12-82, during the course of a robbery of a restaurant, the defendant and an accomplice repeatedly stabbed two people, tied one of them up, and cut both of the victims' throats. Thus, two aggravating circumstances were present — a killing during the course of a robbery and the commission of more than one murder arising out of the same incident. Unlike Tichnell, Green had previously been found guilty of crimes of violence.[36] Nevertheless, the trial court found as a mitigating circumstance that it was unlikely that Green would engage in further criminal activity. An additional mitigating circumstance was that the defendant's conduct was not the sole proximate cause of the two deaths.

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35. Additionally, the record shows that Porter had not served in the military.

36. Green was convicted of two separate incidents of escape, one in May and one in October of 1977.

The record additionally shows that Green was convicted of burglary in 1957; receiving stolen goods in 1958; assault and three larcenies in 1959; three larcenies and breaking and entering in 1962; breaking and entering in 1964; burglary in 1966; possession of a deadly weapon in 1969; possession of heroin, forgery, receiving stolen goods, and unauthorized use of a vehicle in 1971; two larcenies in 1972; interstate transportation of a stolen motor vehicle in 1973; and possession of a deadly weapon in 1980.

C.83

In *Johnson*, CT 82-377, Circuit Court for Prince George's County, filed 12-1-82, the defendant abducted and robbed a thirteen-year-old girl. Thereafter, he raped her and beat her about the head with a nunchaku.[37] After the defendant released the victim, he shot her point blank in the back. The defendant had not previously been found guilty of a crime of violence.[38] It was found that the defendant was unlikely to engage in further criminal activity. Additional mitigating circumstances included Johnson's family background, his ability to adjust to a structured environment as evidenced by his school and Air Force experience, the fact that he gave himself up, and that he had leadership qualities that would be helpful to other inmates.

In *Green* and *Johnson*, in each of which persons other than a police officer were killed during the course of a robbery, innocent victims were arbitrarily killed in a brutal and heinous manner under circumstances in which the defendants were not threatened by immediate apprehension. It is for this reason, in my view, that, notwithstanding the various mitigating circumstances, Tichnell's moral culpability is less than that of the defendants in these two cases, both of whom were sentenced to life imprisonment, not death.

I have carefully and conscientiously reviewed the ten cases in the majority's inventory that I deem to be similar to this case. My examination reveals that none of the five similar cases in which the death penalty was imposed, *Calhoun*, *Harris*, *Stebbing*, *Colvin*, and *White*, either singly or collectively, establish that the death penalty is generally imposed throughout the State in cases in which a person who had never previously been found guilty of a crime of violence

37. A nunchaku is a weapon often used in the martial arts. It "is a device consisting of two pieces wood, metal, plastic, or other like substance connected by any chain, rope, leather or other flexible material not exceeding 24 inches in length." Md. Code (1957, 1982 Repl.Vol.), Art. 27, § 36 (b).

38. The record additionally shows that Johnson was convicted of assault with a deadly weapon and possession of a prohibited weapon in 1982.

C. 8.1

kills a police officer in an attempt to evade arrest when unexpectedly threatened with apprehension during a storehouse breaking. Accordingly, these five cases are not sufficient, either singly or collectively, to justify the imposition of the death penalty in this case. As a result, the focus of my proportionality review necessarily shifts from a determination of whether in similar cases the death penalty has been generally imposed throughout the State, to whether Tichnell's moral culpability so far exceeds that of others in similar circumstances sentenced to life imprisonment that the imposition of the death penalty is justified.

My examination of the five similar cases in which life imprisonment was imposed reveals that in three cases, *Monroe*, *Hughes*, and *Porter*, it is questionable whether Tichnell's moral culpability exceeds that of the respective defendants, while in two cases, *Green* and *Johnson*, Tichnell's moral culpability is less than that of the respective defendants.

Under these circumstances, I am not persuaded that Tichnell's moral culpability so far exceeds that of others in similar circumstances sentenced to life imprisonment that the imposition of the death penalty in this case is justified. Thus, even if I agreed with the majority as to the scope of the relevant inventory of similar cases under § 414 (e) (4), I would not find that the death penalty imposed upn Tichnell is justified.

III

As a result of the majority's exclusion of "death-eligible murder cases in which the prosecutor could have, but did not seek the death penalty" from the relevant inventory of similar cases, I am unable to determine, pursuant to § 414 (e) (4), that the sentence of death imposed upon Tichnell is excessive or disproportionate to the penalty imposed in sim-

C. 85

ilar cases, considering both the crime and the defendant. Moreover, even if I agreed with the majority's restriction of the relevant inventory of similar cases, based upon my statutorily mandated proportionality review, I would hold that the sentence of death in this case is excessive and disproportionate. I therefore would set the sentence aside and remand for modification to life imprisonment.[39]

39. In light of this conclusion, I need not consider the other issues addressed in the majority opinion.

C. 88

APPENDIX I

STATISTICAL SUMMARY OF RECORD IN *CALHOUN V. STATE* RELATING TO PROSECUTORIAL DISCRETION IN DEATH PENALTY CASES

APPENDIX I

STATISTICAL SUMMARY OF RECORD IN CALHOUN V. STATE
RELATING TO PROSECUTORIAL DISCRETION IN DEATH PENALTY CASES

[illegible]	10	3	0	0	3*	3*	1*	30%	15%
[illegible]	6	5	2	1	3*	1	3*	50%	33%
[illegible]	2	2	0	0	2	1	1	100%	50%
[illegible]	3	1	0*	0	1*	1*	0	33%	0%
[illegible]	1	0	0	0	0	0	0	0%	
[illegible]	0	0	0	0	0	0	0	0%	
[illegible]	1	1	1	0	1	1	0	50%	0%
[illegible]	2	2	0	0	2	1	1	40%	25%
[illegible]	1	1	0	0	1	1	0	100%	0%
[illegible]	4	3	1	1	1	1		17%	0%
[illegible]	13	11	10*	1	1	1	0	5%	0%
[illegible]	1	0						0%	
[illegible]	1	1	0	0				0%	
[illegible]	[illegible] 141	4	1*	0	3*	2*	1*	1.8%	.5%
TOTAL	214	43	22	3	18	12	6	7.8%	2.8%

*Figures including disposition of cases which were found on pending in the Calhoun record.

**Statistics from a Montgomery County was unable to state exactly how many qualifying murders had been charged but stated that there were between 40 and 50 murders charged per year in the 3.5 years of the statute's effectiveness.

App. 1

C.87

Misc. No.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

RICHARD DANNY TICHNELL

and

JAMES ARTHUR CALHOUN,

Petitioners

v.

STATE OF MARYLAND,

Respondent

APPENDIX TO PETITION FOR

WRIT OF CERTIORARI

APPENDIX D

Order of the Court of Appeals of Maryland denying motion for rehearing in Tichnell v. State, 297 Md. 432, ___ A.2d ___ (1983), filed on December 5, 1983 ..... D.1

RICHARD DANNY TICHELL	*	In The
	*	Court of Appeals
v.	*	of Maryland
	*	No. 1
STATE OF MARYLAND	*	September Term, 1981

* * * * * *

O R D E R

Upon consideration of the motion for reconsideration and to delay issuance of the mandate pending reconsideration filed in the above entitled case, it is this 5th day of December, 1983

ORDERED, by the Court of Appeals of Maryland, that the motion be, and it is hereby, denied.

/s/ Robert C. Murphy
Chief Judge

Judge Davidson would have granted the motion.

Misc. No.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

RICHARD DANNY TICHNELL

and

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Petitioners

v.

STATE OF MARYLAND,

Respondent

APPENDIX TO PETITION FOR

WRIT OF CERTIORARI

APPENDIX E

Order of Honorable Warren E. Burger, Chief Justice of the United States, extending Time to File Petition for Writ of Certiorari To and Including March 4, 1984 ..... E.1

Supreme Court of the United States

No. A-598 , October Term, 19 83

RICHARD DANNY TICHNELL,

Petitioner,

v.

MARYLAND

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner(s),

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including March 4, 1984.

/s/ Warren E. Burger
Chief Justice of the United States.

Dated this 25th
day of January, 1984.

E. 1

Misc. No.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

RICHARD DANNY TICHNELL

and

JAMES ARTHUR CALHOUN,

Petitioners

v.

STATE OF MARYLAND,

Respondent

APPENDIX TO PETITION FOR

WRIT OF CERTIORARI

APPENDIX F

Opinion of the Court of Appeals of Maryland in Calhoun v. State, 297 Md. 563, ___ A.2d ___ (1983), filed on November 21, 1983 ..... F.1

563] Syllabus.

JAMES ARTHUR CALHOUN v. STATE OF MARYLAND

[No. 129, September Term, 1981 and
No. 3, September Term, 1982.]

Decided November 21, 1983.

CRIMINAL LAW — APPEAL — WITNESSES — *Findings Of Fact — Hypnosis — The Judgment Of The Lower Court Will Not Be Set Aside On The Evidence Unless Clearly Erroneous — Md. Rule 886.* This rule is applicable to the trial judge's determination that there was no significant variance between the prehypnotic and posthypnotic statements of certain witnesses. The Court *held* that the determination of the lower court was not clearly erroneous. p. 577

CRIMINAL LAW — WITNESSES — *Hypnosis — A Person May Testify In Accord With Statements Clearly Demonstrated To Be Made Prior To Hypnosis — Such Is Not Hypnotically Enhanced Testimony — There Is No Required Procedure For Demonstrating Reliability.* Where it was clearly demonstrated that the witnesses' testimony did not depend upon hypnosis, the Court *held* that even if the witness had made no courtroom identification of the defendant, the extrajudicial identification would have been admissible in evidence. pp. 577-578

CRIMINAL LAW — JURIES — APPEAL — WAIVER — *Challenge For Cause.* Where defense counsel said, "We are satisfied," after the last juror was sworn subsequent to the exhaustion of the defendant's peremptory challenges, the Court *held* that the challenge of a juror for cause was waived. pp. 579-580

CRIMINAL LAW — JURIES — *Impartial Jurors — Persons Accused Of Crime Are Entitled To Be Tried By A Fair And Impartial Jury — To Be Competent, A Juror Need Not Be Free Of All Preconceived Notions Or Be Totally Ignorant Of The Facts And Issues Involved — It Is Sufficient If The Juror Can Lay Aside His Impressions Or Opinions And Render A Verdict Based Solely On The Evidence Presented In The Case — U. S. Const., Fourteenth Amendment — Md. Const., Declaration Of Rights, Art. 21.* pp. 580-583

CRIMINAL LAW — WITNESSES — ACCOMPLICES AND ACCESSORIES — *Approver — Approver Shall Never Be Admitted In Any Case Whatsoever — Md. Code, Art. 27, § 635.* p. 584

CRIMINAL LAW — WITNESSES — ACCOMPLICES AND ACCESSORIES — *Approver — The Statutory Prohibition Of The Practice Of Approvement Does Not Bar The Testimony Of An Accomplice Against Those With Whom He Was Associated In A Criminal Act — Md. Code, Art. 27, § 635.* The

ancient common law practice of approvement has grown into disuse by long discontinuance. An approver is one indicted for treason or felony who confesses the fact and accuses his accomplices; if the person accused by him is found guilty, the approver is entitled to a pardon, but if the accused is acquitted, the approver is hanged, upon his own confession. An accomplice who testifies is not entitled to a pardon if the fellow prisoner is convicted, nor punished if he is acquitted; the accomplice's acquittal or conviction depends upon the evidence adduced at his own trial; he is entitled, at best, to a recommendation for mercy for his cooperation. pp. 584-589

CRIMINAL LAW — SENTENCE — *Death Penalty — Aggravating Factors — The Definitions Of Aggravating Factors May Not Be Construed To Make Identical Facts Constitute Two Aggravating Factors — Each Factor Must Include A Different And Important Element — Md. Code, Art. 27, § 413 (d).* Where each of three aggravating factors included a different element, the Court *held* that it was not error to submit each aggravating factor to the jury for consideration. pp. 589-593

CRIMINAL LAW — SENTENCE — *Death Penalty — If The Jury Is Unable To Agree Within A Reasonable Time, The Court Imposes A Sentence Of Life Imprisonment — Md. Code, Art. 27, § 413 (k) (2).* p. 593

CRIMINAL LAW — SENTENCE — INSTRUCTIONS TO JURY — *Death Penalty — The Court Shall Instruct The Jury As To Burden Of Proof And Findings Necessary To Determine The Sentence — Md. Code, Art. 27, § 413 (c) (3).* p. 593

CRIMINAL LAW — INSTRUCTIONS TO JURY — APPEAL — *An Objection To Jury Instructions Is Not Reviewable As Of Right Unless It Is Made In Compliance With Rule 757 (f) — Md. Rule 757 (h).* p. 594

CRIMINAL LAW — APPEAL — *"Plain Error" — An Appellate Court Should Take Cognizance Of Unobjected To Error Only When It Is So Fundamental As To Deny The Defendant A Fair Trial.* Although the alleged unobjected to error was not a "plain error," the Court addressed the contention because this is a capital case. p. 594

CRIMINAL LAW — SENTENCE — INSTRUCTIONS TO JURY — *Death Penalty — The Statute Mandating The Sentence Of Life Imprisonment If The Jury Is Unable To Reach A Decision Within A Reasonable Time Is Directed To The Court, Not The Jury — Md. Code, Art. 27, § 413 (k) (2).* Since the jury reached its decision within a reasonable time, no instruction was required. p. 595

CRIMINAL LAW — TRIALS — *Opening Statement — The Purpose Of An Opening Statement Is To Orient The Jurors To The Evidence, Not To Argue The Merits Or Discuss The Pertinent Law.* p. 596

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CRIMINAL LAW — SENTENCE — EVIDENCE — *Death Penalty — In A Death Penalty Sentencing Proceeding, Evidence Of Mitigating Or Aggravating Circumstances, Prior Convictions, Presentence Investigation, And Other Evidence The Court Deems Relevant Is Admissible — Md. Code, Art. 27, § 413 (c) (1).* p. 598

CRIMINAL LAW — SENTENCE — EVIDENCE — *Death Penalty — "Crime Of Violence" Defined — A "Crime Of Violence" Is Abduction, Arson, Escape, Kidnapping, Manslaughter (Except Involuntary), Mayhem, Murder, Robbery, Rape, Sexual Offense, Or An Attempt To Commit Such Offenses, Or Use Of A Handgun In A Felony Or Other Crime Of Violence — Md. Code, Art. 27, § 413.* p. 599

CRIMINAL LAW — SENTENCE — EVIDENCE — *Death Penalty — Other Crimes — In A Death Penalty Sentencing Proceeding, Evidence Of Unrelated Crimes Is Limited To Convictions — Evidence Of Underlying Facts And Circumstances Is Precluded — Md. Code, Art. 27, § 413 (c) (1) (iii).* p. 600

CRIMINAL LAW — EVIDENCE — APPEAL — SENTENCE — *Death Penalty — Stating Specific Grounds For An Objection, Without A Request By The Trial Court, Waives The Right To Challenge The Evidence On Other Grounds.* Where counsel made no general objection to evidence regarding the defendant's misconduct at the detention center, but made the specific objection that it bore no relationship to the specified aggravating circumstances, and where counsel did not raise the issue that it was an attempt to elicit information pertaining to a criminal act on the part of the defendant for which there had been no conviction, the Court *held* that in the absence of an objection concerning the admissibility of the evidence under Art. 27, § 413 (c) (1) (iii), the evidence was admissible under § 413 (c) (1) (v), permitting other evidence the trial court deems relevant. pp. 600-601

CRIMINAL LAW — SENTENCE — MURDER — *Death Penalty — A Person Convicted Of First Degree Murder Is Sentenced To Life Imprisonment Unless The State Notifies Him Of Its Intention To Seek The Death Penalty And The Aggravating Circumstances Upon Which It Relies, And The Death Sentence Is Imposed In Accordance With Md. Code, Art. 27, § 413 — Md. Code, Art. 27, § 412 (b).* p. 602

CRIMINAL LAW — CONSTITUTIONAL LAW — SENTENCE — *Death Penalty — Prosecutorial Discretion — U.S. Const., Eighth And Fourteenth Amendments — Md. Const., Declaration Of Rights, Arts. 16 And 25.* Absent any specific evidence of indiscretion by prosecutors resulting in an irrational, inconsistent, or discriminatory application of the death penalty statute, the Court *held* that Md. Code, Art. 27, § 412 as presently applied does not

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violate the Constitutions of Maryland or the United States. To the extent that there is a difference in the practice of the various State's attorneys around the State, the Court's proportionality review would be intended to assure that the death penalty is not imposed in a disproportionate manner. pp. 603-606

CRIMINAL LAW — SENTENCE — *Death Penalty — Trial Judges In Capital Cases Must File A Written Report — Md. Rule 772A.* p. 606

CRIMINAL LAW — SENTENCE — *Death Penalty — The Death Penalty Must Be Imposed In A Rational And Consistent Manner.* p. 607

CRIMINAL LAW — SENTENCE — *Death Penalty — The Sentencing Authority Must Be Provided With Clear And Objective Standards That Provide Specific And Detailed Guidance And Make The Process For Imposing A Sentence Of Death Rationally Reviewable.* p. 607

CRIMINAL LAW — SENTENCE — *Death Penalty — Proportionality Review — The Purpose Of Proportionality Review Is To Guarantee That Death Sentence Will Be Imposed In A Reasonably Consistent Manner — Md. Code, Art. 27, § 414 (e) (4).* p. 609

CRIMINAL LAW — CONSTITUTIONAL LAW — SENTENCE — *Death Penalty — Proportionality Review — "Similar Cases" — "Similar Cases" Are To Be Culled From Those First Degree Murder Cases In Which The State Sought The Death Penalty, Whether It Was Imposed Or Not — "Similar Cases", In Terms Of A Particular Accused And The Particular Crime, Are Those Involving Similar Mitigating And Aggravating Circumstances — Md. Code, Art. 27, § 414 (e) (4).* The Court *held* that Md. Code, Art. 27, § 414 (e) (4) does not violate due process for failure to provide a standard for defining similar cases. pp. 609-610

CRIMINAL LAW — CONSTITUTIONAL LAW — JURIES — *In The Trial Of All Criminal Cases, The Jury Shall Be The Judges Of Law, As Well As Of Fact, Except That The Court May Pass Upon The Sufficiency Of The Evidence To Sustain A Conviction — Md. Const., Declaration Of Rights, Art. 23.* p. 610

CRIMINAL LAW — CONSTITUTIONAL LAW — JURIES — SENTENCE — *The Jury's Function As Judges Of The Law Applies To The Trial Stage Of The Proceeding — It Does Not Apply To The Jury's Role In A Sentencing Proceeding — Md. Const., Declaration Of Rights, Art. 23.* p. 611

CRIMINAL LAW — CONSTITUTIONAL LAW — JURIES — SENTENCE — *The Jury's Authority As Judges Of The Law Is Limited To Deciding The Law Of The Crime And The Legal Effect Of The Evidence Before It — All Other Legal Issues Are For The Judge Alone To Decide — Md. Const., Declaration*

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Of Rights, Art. 23. Article 23 of the Declaration of Rights does not deny the Court the power to review the sentencing process in a capital punishment case pursuant to Md. Code, Art. 27, § 414 (e). pp. 611-612

CRIMINAL LAW — CONSTITUTIONAL LAW — SENTENCE — *Cruel And Unusual Punishment Is Constitutionally Prohibited — U. S. Const., Eighth And Fourteenth Amendments — Md. Const., Declaration Of Rights, Arts. 16 And 25.* p. 612

CRIMINAL LAW — CONSTITUTIONAL LAW — SENTENCE — *Death Penalty — The Death Penalty Is An Acceptable Form Of Punishment — U.S. Const., Eighth And Fourteenth Amendments.* p. 612

CRIMINAL LAW — CONSTITUTIONAL LAW — SENTENCE — *Death Penalty — Lethal Gas — Death By Cyanide Gas Is Not Unconstitutionally Cruel And Unusual Punishment — U.S. Const., Eighth And Fourteenth Amendments — Md. Const., Declaration Of Rights, Arts. 16 And 25.* pp. 616-617

CRIMINAL LAW — CONSTITUTIONAL LAW — SENTENCE — EVIDENCE — *Death Penalty — The Sentencing Process Must Provide For Determination And Consideration Of The Character Traits And Propensities Of The Individual Offender And The Circumstances Of The Particular Offense — All Relevant Information, Positive And Negative, Is Admissible During The Sentencing Proceeding — U. S. Const., Eighth And Fourteenth Amendments.* pp. 618-619

CRIMINAL LAW — SENTENCE — EVIDENCE — APPEAL — *Death Penalty — Harmless Error — The Doctrine Of Harmless Error Is Applicable To A Capital Sentencing Proceeding.* p. 620

CRIMINAL LAW — CONSTITUTIONAL LAW — SENTENCE — EVIDENCE — *Death Penalty — Although A Death Sentence May Not Rest Solely On A Nonstatutory Aggravating Factor, Other Information May Be Considered — U.S. Const., Eighth And Fourteenth Amendments.* The Constitution does not prohibit consideration, at the sentencing phase, of information not directly related to either statutory aggravating or statutory mitigating factors, as long as that information is relevant to the character of the defendant or the circumstances of the crime. p. 621

CRIMINAL LAW — CONSTITUTIONAL LAW — SENTENCE — EVIDENCE — *Death Penalty — Evidence Concerning Future Dangerousness Is Not So Speculative And Unreliable As To Result In A Denial Of Due Process — U.S. Const., Eighth And Fourteenth Amendments — Md. Const., Declaration Of Rights, Art. 25.* Evidence of the defendant's misconduct at the detention center did not violate the Constitution because it was relevant to an "individualized determination" of the defendant's character. pp. 622-623

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CRIMINAL LAW — CONSTITUTIONAL LAW — SENTENCE — *Death Penalty — A Capital Sentencing Scheme Must Provide A Meaningful Basis For Distinguishing The Few Cases In Which The Death Penalty Is Imposed From The Many Cases In Which It Is Not — U.S. Const., Eighth And Fourteenth Amendments.* p. 624

CRIMINAL LAW — CONSTITUTIONAL LAW — SENTENCE — *Death Penalty — Aggravating Factors — Felony Murder — Under The Maryland Statute, Felony Murder As An Aggravating Circumstance Is Not Unconstitutionally Overbroad — Md. Code, Art. 27, §§ 413 (d) (10) And 413 (e) (1).* The aggravating factor of felony murder is limited by the statute to murder in the commission of certain specified felonies, rather than all felony murders, and the defendant must also be a principal in the first degree. pp. 624-626

CRIMINAL LAW — CONSTITUTIONAL LAW — SENTENCE — *"Excessive" Punishment — A Punishment Is Excessive If It (1) Makes No Contribution To Acceptable Goals Of Punishment And Needlessly Imposes Pain And Suffering, Or (2) Is Grossly Out Of Proportion To The Severity Of The Crime.* p. 626

CRIMINAL LAW — CONSTITUTIONAL LAW — SENTENCE — *Death Penalty — The Death Penalty Is Not A Disproportionate Sentence For The Crime Of Murder.* p. 627

CRIMINAL LAW — CONSTITUTIONAL LAW — SENTENCE — *Death Penalty — The Jury's Authority To Sentence A Person Convicted Of First Degree Murder To Death Is Constitutional As Long As Procedural Safeguards Exist That Guide And Channel The Jury's Decision So As To Minimize The Risk Of Wholly Arbitrary And Capricious Action.* pp. 631-632

CRIMINAL LAW — CONSTITUTIONAL LAW — SENTENCE — *Death Penalty — A Sentencing Jury's Exercise Of Discretion Is Permissible As Long As It Is Conducted Within The Confines And In Compliance With The Standards Of A Carefully Drafted Capital Sentencing Statute — Md. Code, Art. 27, § 413.* Where the capital sentencing statute required the sentencing authority to: 1) determine whether any enumerated statutory aggravating circumstance exists beyond a reasonable doubt; 2) (if aggravating circumstance exists) consider whether any mitigating circumstance (not restricted to those specifically enumerated) exists by a preponderance of the evidence; 3) determine whether the mitigating circumstances outweigh the aggravating circumstances by a preponderance of the evidence (only if the mitigating circumstances do not outweigh the aggravating circumstances is the death penalty imposed); 4) make its determination unanimously and in writing; and 5) specify in writing the factors considered in rendering its decision; the Court *held* that the statute provided the necessary guidance and means of channeling the jury's discretion. pp. 634-635

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CRIMINAL LAW — CONSTITUTIONAL LAW — SENTENCE — APPEAL — *Death Penalty* — Where the jury found a mitigating circumstance, the Court *held* that the appellant's contention that the Maryland death penalty statute is unconstitutional because it mandates the sentence of death in any case where one or more aggravating circumstances are found but no mitigating circumstance is found, was not before the Court. pp. 635-636

CRIMINAL LAW — SENTENCE — *Death Penalty — Mitigating Factors — The Sentencing Authority May Articulate Any Factor It Finds In Mitigation — Md. Code, Art. 27, § 413 (g) (8).* Where the statute permitted the sentencing authority to consider any other facts which the jury or judge specifically sets forth in writing that it finds as mitigating circumstances in the case, and where in the forty-eight cases where the State sought the death penalty it was imposed twenty times, the Court *held* that the statute did not mandate the imposition of the death penalty in any given type of case. pp. 635-637

CRIMINAL LAW — CONSTITUTIONAL LAW — SENTENCE — *Death Penalty — Mitigating Factors — Burden Of Proof.* The appellant's claim that the statute unconstitutionally places the burden of proof to show mitigation on the accused was thoroughly considered and rejected in *Tichnell v. State*, 287 Md. 695, 720-34 (1980). pp. 637-638

CRIMINAL LAW — SENTENCE — *Death Penalty — A Person May Not Be Punished By Death Absent Proof That He Was A Principal In The First Degree To First Degree Murder — Md. Code, Art. 27, § 413 (e) (1).* p. 638

CRIMINAL LAW — *Principal — A First Degree Principal Is One Who Actually Commits A Crime.* p. 638

CRIMINAL LAW — *Sufficiency Of The Evidence — The Applicable Standard Is Whether, After Viewing The Evidence In The Light Most Favorable To The Prosecution, Any Rational Trier Of Fact Could Have Found The Essential Elements Of The Crime Beyond A Reasonable Doubt.* The Court *held* that there was sufficient evidence to conclude that the appellant was a principal in the first degree. pp. 638-639

CRIMINAL LAW — SENTENCE — *Death Penalty — Proportionality Review — Md. Code, Art. 27, § 414 (e).* Where the sentencing authority found that three aggravating circumstances were proven beyond a reasonable doubt, and the defendant's environment was the sole mitigating circumstance, after reviewing similar cases the Court found that the sentence of death was not imposed under the influence of passion, prejudice, or any other arbitrary factor; the evidence supports the jury's finding of a statutory aggravating circumstance and the finding that the aggravating circumstances are not

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outweighed by mitigating circumstances; and the sentence of death is not excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant. p. 646

R. J. B.

Appeal from the Circuit Court for Montgomery County (CAVE, J.).

James Arthur Calhoun was convicted of first degree, premeditated murder of one victim (principal in the first degree), first degree murder (felony murder) of a second victim (principal in the second degree), attempted murder of a third victim, robbery with a deadly weapon, storehouse breaking, and two violations of the handgun law. He was sentenced to death for the premeditated murder, life imprisonment (consecutive) for the felony murder, thirty years (consecutive) for the attempted murder, twenty years (consecutive) for the robbery, ten years (concurrent) for the storehouse breaking, and fifteen years (consecutive) for each of the handgun violations. The Court reviews the case pursuant to Md. Code, Art. 27, § 414. The appeal was initially argued on October 8, 1982. The issue relating to proportionality review was argued on January 6, 1983.

Judgment affirmed.

The cause was argued before MURPHY, C. J., and SMITH, ELDRIDGE, COLE, DAVIDSON, RODOWSKY and COUCH, JJ.

Gary W. Christopher and *George E. Burns, Jr.*, *Assistant Public Defenders*, with whom were *Alan H. Murrell*, *Public Defender*, *Arthur A. DeLano, Jr.*, *Assistant Public Defender*, *Courtland K. Townsend, Jr.*, *Assigned Public Defender*, and *James Cromwell*, *Assigned Public Defender*, on the brief, for appellant.

Richard B. Rosenblatt, *Assistant Attorney General*, with whom were *Stephen H. Sachs*, *Attorney General*, and *Deborah K. Handel*, *Assistant Attorney General*, on the brief, for appellee.

Supplemental argument on January 6, 1983. *George E. Burns, Jr.*, *Assistant Public Defender*, for appellant and

Deborah K. Handel, Assistant Attorney General, for appellee.

SMITH, J., delivered the opinion of the Court. DAVIDSON, J., dissents and files a dissenting opinion at page 646 *infra*.

In this case we shall affirm a death sentence. In the process we once again are involved with the matter of hypnotically enhanced testimony, this being the fifth of a series of cases presenting that issue. *See State v. Collins*, 296 Md. 670, 464 A.2d 1028 (1983); *State v. Metscher*, 297 Md. 368, 464 A.2d 1052 (1983); *Simkus v. State*, 296 Md. 718, 464 A.2d 1055 (1983), and *Grimes v. State*, 297 Md. 1, 464 A.2d 1065 (1983).

James Arthur Calhoun was convicted by a Montgomery County jury of first degree, premeditated murder in the death of Philip Metz (principal in the first degree), murder in the first degree (felony murder) in the death of David Myers (principal in the second degree), attempted murder of Douglas Cummins, two violations of the handgun law, robbery with a deadly weapon, and storehouse breaking. A jury sentenced him to death for the murder of Metz. Life imprisonment was imposed for the murder of Myers. He was sentenced to thirty years for the attempted murder of Cummins. The sentence for each of the handgun violations was imprisonment for fifteen years. He was sentenced to twenty years on the robbery charge and to ten years on the count for storehouse breaking. All sentences imposed are to run consecutive to each other except for the sentence for storehouse breaking which is concurrent. The case reaches us by virtue of the provisions of Maryland Code (1957, 1982 Repl. Vol.) Art. 27, § 414 which states that whenever the death penalty is imposed we shall review the case.

I The facts

The facts are not in dispute. Pursuant to Maryland Rule 828 g the parties have entered into an agreed statement of facts. We shall repeat only so much of the grisly details of this incident as are necessary for a clear understanding of the case and our decision.

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The W. Bell store is located at 1130 New Hampshire Avenue in White Oak, Montgomery County. Banging noises coming from the area of the Bell store were heard by a neighbor across the street at approximately 11:00 p.m. on March 26, 1981. She saw shadows in the area of the roof at the back of the store. The neighbor notified her father, who went outside their home with a flashlight to investigate. He saw people leaving. She saw a car, which looked like a hatchback, parked across the street.

An employee of Electro Protective Corporation testified that at 6:16 a.m. on March 27, 1981, both the safe alarm and the perimeter alarm at the Bell store were activated. He notified the police; Douglas T. Cummins, Jr., Bell's assistant manager; and David W. Myers, an employee of Electro. Officer Philip Carl Metz, the police officer covering that beat on that particular day, was dispatched to the Bell store.

Cummins testified that at approximately 6:20 or 6:25 a.m. on March 27 he received a telephone call from Electro. He arrived at the store at about 7:00 a.m. at which time he saw a white station wagon with Electro's name on the door in front of the store. He observed a late model two-door black Cadillac on the other side of the parking lot. A black male in the front seat was the sole occupant.

The technician in the Electro vehicle identified himself to Cummins. Cummins drove around the store and noticed that the outside of the building appeared to be secure. Officer Metz arrived on the scene at about 7:15 a.m. Cummins unlocked Bell's door with a set of master keys. He, Officer Metz, and Myers entered the building. They first checked the merchandise area. Then they proceeded to the cashroom. It had two doors, both of which supposedly could be opened only from the inside. Cummins put a key into the door. Upon his opening the door Officer Metz stepped in front of him to enter. At that moment Cummins noticed "a shoulder and about half of a back of an individual standing to the right of the doorway." Metz was pulled into the doorway as another, shorter individual armed with a pistol jumped into the hallway area. Cummins did not see the place from which the shorter man came. Myers drew his gun and stumbled back

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into a hallway door when he was shot. Cummins said he realized he had been shot in the upper shoulder area of his chest. After thirty to forty-five seconds the taller man opened the door and dragged Cummins into the office. Cummins at that point observed Metz lying on the floor and bleeding from the head. Cummins said that although he saw or heard no evidence of a third person he had no idea whether there might have been other individuals there who had left through another door by the time he was dragged into the room. He asserted that the shorter man shot him and he could only assume that it was the taller person who shot Metz.

Cummins complied with the taller man's order to open a combination safe. He was then asked by that same person to open a second safe. He was hit on the left side of his head with a pistol when he reached for his wallet which contained the combination to the second safe. Cummins said that after he failed twice in his efforts to open the second safe this taller person cocked a pistol, put it to the side of Cummins' head and informed him that if he did not open the safe that time he was a dead man. He succeeded in opening the safe. He was then told to sit on the floor. His wrist was handcuffed to a file cabinet drawer. He heard his assailants scramble up through the ceiling of the office "and then back down on the other side." He pulled himself onto a chair, pulled the file drawer from the cabinet, carried the drawer by its handle to a telephone in the loading dock area, and called the police. After failing to detect a pulse from Myers' neck, he went to the door and waited for help.

Cummins testified that both of the men that he saw were wearing stocking masks which covered their entire heads. Both men wore gloves on their hands. Cummins observed gaps between the sleeve cuffs and the top of the gloves of these persons from which he determined they were black.

James Adcock testified that while working as a plumber on the fourth floor of a building next door to the Bell store, at approximately 7:00 a.m. on March 27, 1981, he looked out the window and saw two black males running across the parking lot. He said they "skipped" over a fence, jumped over

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a wall and went into a parked "brown or maroon-looking car" that then drove away.

Evidence to connect Calhoun with the crime included that of an accomplice who testified pursuant to a plea agreement. His testimony included a description of an attempt by him and another to break into the Bell store through the roof shortly after midnight on the morning of this incident. They were frightened away when they noticed someone watching them with a flashlight from across the parking lot. He related how later, in the early hours of that morning, he and his associates encountered Calhoun, discussed the hole they had put in the Bell roof, and worked out a plan for entering the store. They then waited for the manager to arrive so that the robbery could be effected. He described the operation in detail including mention of weapons, a description of the stocking masks used and their source, and testimony as to the amount of money taken and its division. There was substantial other evidence adduced in addition to that of the accomplice including testimony concerning casts made of footprints found in the area. Two of these casts matched one of the shoes of the accomplice.

Other relevant facts will be set forth as we review the points raised.

ii Hypnotically enhanced testimony

Lt. James Roby of the Montgomery County Police Department was asked to conduct hypnotic interviews with Adcock and Cummins to ascertain if they could recall any details of the crime which they had not previously related to the police. Adcock was hypnotized on the day of the crime. Cummins was hypnotized on April 13. An audiotape recording was made of the hypnotic session with Adcock. The session with Cummins was placed on video tape. Dr. David Stern, a licensed clinical psychologist whose qualifications we mentioned in *Collins*, 296 Md. 670, and *Metscher*, 297 Md. 368, compared Adcock's and Cummins' prehypnosis statements with the tapes of their hypnotic sessions and concluded that hypnotically enhanced memory was not present as to either Adcock or Cummins.

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Prior to hypnosis Adcock made statements to three different police officers. He set forth what he observed while working as a plumber in a building next to the Bell store. He described two black males, apparently teenagers, whom he saw running across the parking lot toward a car. On one occasion he pointed to a burgundy colored Datsun 310 and said the vehicle looked very similar to the one he had seen. On another occasion he indicated that the car in question was a dark, chocolate brown, Honda-type, "sawed-off" foreign car. He described where it was parked. His posthypnotic testimony at the motion to suppress hearing was consistent with the prehypnotic testimony.

Cummins was first interviewed on the morning of the incident while being prepared for surgery. He was interviewed twice the day after surgery and again on April 2. He described in substantial detail the incidents in question. On April 6, a photographic array of seven pictures was exhibited to Cummins. At first he said he could not identify anyone. Later he touched the photograph of Calhoun and said that the shape of the head was very similar to that of the taller of his assailants but that he would be better able to tell if he had a full view of the person. Subsequently, he tapped Calhoun's photograph and said that of the seven, "that's who I'd put my money on." His posthypnotic testimony at the hearing on the motion to suppress was consistent with the interviews.

The trial judge stated in pertinent part relative to the motion to suppress Adcock's and Cummins' testimony:

> "I further find that [the hypnotist] was objective in the application of the technique; that he did not suggest by leading questions or interrogation what the answer should or should not be. I further find that if it is not the test, that it certainly should be. You do not go merely on the episode itself. You should have somewhat of what I will refer to as a self-verification or self-corroboration, and that is statements that were made prior to the hypnosis and what statements were made during hypnosis. If

there is a discrepancy between the two, then there must be a determination by the trier of fact as to whether or not those discrepancies were introduced in some manner by hypnosis, and may in fact be confabulation to the extent therefore the witness should not be allowed to testify.

"If that were true that should not preclude the witness from being allowed to testify or some testimony as to their factual recitation prior to hypnosis. How that is accomplished in a case by case basis may present some substantial difficulty.

"The next question was post hypnotic suggestion employed. There has been no suggestion — post hypnotic suggestion other than relaxation of the witness, indeed in both of the witnesses. I don't know why in the world Mr. Adcock needed to be relaxed. Apparently he was never relaxed from the hypnosis. He didn't vary one degree. I find no evidence of post hypnotic suggestion. I find the absence of post hypnotic suggestion.

"I find from observing the tape that when compared with the statements given prior to the hypnotic episode, that there has been no suggestive or confabulation during the hypnotic episode, and therefore, that Mr. Cummins should not be precluded from testifying; that the fact that he was hypnotized goes to the weight to be given by the jury as to that question. It therefore is going to require the availability of all of the expert's testimony before the trier now, the trier of fact, the jury, and although the Court suggests that it is a trial court's obligation to produce those witnesses for the defendant or before the jury, it would not appear that I could call them as Court witnesses over the objection of the defendant, because it could well have a reverse effect, that if the jury were to hear the fact that the witness was hypnotized, and believe that hypnosis in fact made it more likely

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that he was telling the truth, it would be detrimental to the defendant.

"In any event I think the fact that hypnosis was used should be fully exposed as was done in Martin. So it leads up to the motion to declare Mr. Adcock and Mr. Cummins incompetent per se to testify, the Court denies that motion."

In his brief and at oral argument Calhoun makes much of the fact that at one point prior to hypnosis, when asked if he could identify either individual, Cummins said, "To be honest, I doubt it[,]" but "[a]t trial, however, he identified [Calhoun] without hesitation as the only person inside the cash office when the door opened." This overlooks the fact that prior to hypnosis he selected the picture of Calhoun and indicated he would put his money on it as that of his assailant.

Maryland Rule 886 provides:

"When an action has been tried by the lower court without a jury, this Court will review the case upon both the law and the evidence, but the judgment of the lower court will not be set aside on the evidence unless clearly erroneous and due regard will be given to the opportunity of the lower court to judge the credibility of the witnesses."

That rule is applicable to the trial judge's determination that there was no significant variance between the prehypnotic and posthypnotic statements of Adcock and Cummins. We do not find the determination of the lower court in that instance to be clearly erroneous.

We considered the whole matter of hypnotically enhanced testimony in *Collins*, 296 Md. 670. We concluded:

"We see no reason why a person should not be permitted to testify in court in accord with statements which it clearly can be demonstrated he made prior to hypnosis. Such is not then hypnotically enhanced testimony. This seems to be in

> accord with the majority view. We do not go so far as to spell out the exact procedures which must be followed to clearly demonstrate that such statements were made prior to hypnosis. One method certainly might be to follow the guidelines laid down by the Arizona court in *[State ex rel.] Collins [v. Superior Court, etc.]*, 132 Ariz. 180, 210, [644 P.2d 1266 (1982),] which we have heretofore quoted. Since one cannot possibly envision all possible situations in which statements prior to hypnosis might be demonstrated to accord with posthypnotic testimony, we deem it wise not to attempt to spell out each and every condition or possibility for demonstrating reliability. To do otherwise is to risk omission of acceptable solutions which do not occur to us." 296 Md. at 702-03.

It was clearly demonstrated that the Cummins and Adcock testimony did not depend upon hypnosis. Cummins identified Calhoun's photograph prior to hypnosis. Even if he had made no courtroom identification of Calhoun his extra-judicial identification would have been admissible in evidence. *Bedford v. State*, 293 Md. 172, 177, 443 A.2d 78 (1982); *Johnson v. State*, 237 Md. 283, 291, 206 A.2d 138 (1965).

When this case was tried the trial court and counsel did not have available what we have said in *Collins*. It is noteworthy, however, that an audiotape was made of the hypnotic interview of Adcock and a video tape made of the hypnotic interview of Cummins. Moreover, tape recordings were made of some but not all of the prehypnotic interviews with Cummins.

The trial judge's ruling here was in accord with *Collins*.

iii Refusal to strike a juror for cause

Calhoun contends that the trial court erred and abused its discretion in refusing to strike for cause juror 58. When the jurors were interrogated on their voir dire as to whether

they, their families or friends had been the victims of crime. juror 58, Ralph DeMarco, responded that his wife's wallet was stolen the year before on L Street in Washington, D. C., that his wife's parents and the DeMarcos' next door neighbors both were burglarized within the previous two years, and that a close friend was robbed at gunpoint on Connecticut Avenue about two years before. He was asked, "As a result of any of those instances, would that in any way affect your ability to be a fair and impartial juror in this case?" He responded in the negative.

Later DeMarco was questioned individually as to his prior knowledge of the case. He replied:

> "I read the accounts of people being apprehended a few months ago. I remember a few things about him. I can't remember anything specifically about this particular defendant. . . . I think one of them had been in prison. One had a girlfriend who he claimed was an alibi. She refused to give him an alibi. It may have referred to some other trial. I think it was this case."

He earlier had been asked whether he had "any feelings on today's criminal justice system, the courts, crime, sentencing and defendants' rights." He stated, "I think that a lot of people are being let off. Most crimes, I think, are committed by repeater offenders and that sort of thing." DeMarco affirmed that he could be "a fair and impartial juror in deciding this particular case only on the facts and evidence presented." The trial judge overruled a challenge for cause. One of Calhoun's peremptory challenges was then exercised. Calhoun contends that the refusal of the trial judge to grant his challenge for cause effectively reduced the number of his peremptory strikes from twenty to nineteen.

There is both a short and a long answer to Calhoun's contentions. The short answer is that counsel said, "[W]e are satisfied[,]" after the last juror was sworn subsequent to the exhaustion of Calhoun's peremptory challenges. The State then announced its satisfaction. Thus, the point is waived.

Glover, Robinson & Gilmore v. State, 273 Md. 448, 452-53, 330 A.2d 201 (1975). However, because of the nature of the case we shall give the "long answer" to Calhoun's contentions.

What the Supreme Court said in *Irvin v. Dowd*, 366 U.S. 717, 81 S.Ct. 1639, 6 L. Ed. 2d 751 (1961), has significance here:

> "It is not required, however, that the jurors be totally ignorant of the facts and issues involved. In these days of swift, widespread and diverse methods of communication, an important case can be expected to arouse the interest of the public in the vicinity, and scarcely any of those best qualified to serve as jurors will not have formed some impression or opinion as to the merits of the case. This is particularly true in criminal cases. To hold that the mere existence of any preconceived notion as to the guilt or innocence of an accused, without more, is sufficient to rebut the presumption of a prospective juror's impartiality would be to establish an impossible standard. It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court. *Spies v. Illinois*, 123 U.S. 131; *Holt v. United States*, 218 U.S. 245; *Reynolds v. United States*, [98 U.S. 145]." 366 U.S. at 722-23.

Chief Judge Alvey spoke in a similar vein for this Court in *Garlitz v. State*, 71 Md. 293, 18 A. 39 (1889). The accused in that case was convicted of the first degree murder of his wife on one of the public streets of Cumberland. Three jurors indicated that they had formed an opinion as to the guilt or innocence of the accused based upon newspaper accounts and rumor. Each of them, however, indicated that he could give the accused a fair and impartial trial according to the evidence that might be adduced at the trial. Chief Judge Alvey said for the Court:

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"All persons accused of crime are entitled, as matter of right, to be tried by a fair and impartial jury, selected according to law. About this there can be no question. But the question is constantly presented in practice, by what standard or test is the condition of the mind to be tried, in order to obtain with reasonable certainty, the requisite degree of fairness and impartiality in those called upon to serve as jurors? In this age of intelligence and universal reading, with newspapers in the hands of every man with sufficient intelligence to qualify him to sit upon a jury, to require that jurors shall come to the investigation of crime committed in their community, no matter how notorious or atrocious it may be, with minds wholly unaffected or unimpressed by what they may have read or heard in regard to it, is simply to maintain a rule or standard by which every man who is fit to sit upon a jury may be excluded. Many crimes are committed under circumstances of such flagrant atrociousness as to impress and shock the whole community, the ignorant as well as the intelligent; and if such rule of exclusion were applied, it would, in many cases, render the impaneling a jury impossible. Such state of things could never be contemplated by the law. All men, by natural instinct, are supposed to be more or less biased against crime in the abstract; and every member of the community, against which crime has been committed, is naturally interested and impressed with the circumstances of crimes of atrocious character. But the natural bias, however atrocious the crime, can never be regarded as a sufficient cause for the disqualification of the juror. The intellectual, as well as the moral impressions, produced by the reading or hearing of reports or statements of facts in regard to the commission of crime are such that intelligent minds cannot resist; indeed, in many cases the mind receives the impressions from such statements intuitively. But these

> impressions, with intelligent, fair minded men, are always of a hypothetical nature, resting upon the supposition of the truth of what they have read or heard. The minds of such men always remain open to the correction of former impressions, and remain entirely impartial, with power to hear and determine upon the real facts of the case, without the least bias in favor of former impressions, whatever they may have been. And therefore, in our present state of society, all that can be required of a juror, to render him competent, is, that he shall be without bias or prejudice for or against the accused, and that his mind is free to hear and impartially consider the evidence, and to render a verdict thereon without regard to any former opinion or impression existing in his mind, formed upon rumor or newspaper reports. Whenever it is shown that such is the state of mind of the juror, he should be held to be competent; and such is the rule as laid down by this court in *Waters v. State*, 51 Md. 430 [(1879)]. In that case it was said 'that the opinion which should exclude a juror must be a fixed and deliberate one, partaking in fact of the nature of the pre-judgment.' " 71 Md. at 299-300.

Garlitz was quoted at length for the Court by Judge Hammond in *Grammer v. State*, 203 Md. 200, 211-12, 100 A.2d 257 (1953), *cert. denied*, 347 U.S. 938 (1954), and again by Judge Barnes for the Court in *Bristow v. State*, 242 Md. 283, 288-89, 219 A.2d 33 (1966). *See also Green v. State*, 49 Md. App. 1, 3, 430 A.2d 1122 (1981); *Worthen v. State*, 42 Md. App. 20, 45, 399 A.2d 272 (1979).

More recently Chief Judge Murphy said for the Court in *Couser v. State*, 282 Md. 125, 383 A.2d 389, *cert. denied*, 439 U.S. 852 (1978):

> "It is true, of course, that the due process clause of the fourteenth amendment and Article 21 of the Maryland Declaration of Rights guarantee the

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> right to an impartial jury to an accused in a criminal case; these constitutional guarantees do not, however, insure that a prospective juror will be free of all preconceived notions relating to guilt or innocence, only that he can lay aside his impressions or opinions and render a verdict based solely on the evidence presented in the case. *See Irvin v. Dowd*, 366 U.S. 717, 81 S.Ct. 1639, 6 L. Ed. 2d 751 (1961); *Newton v. State*, 147 Md. 71, 127 A. 123 (1924); *Garlitz v. State*, 71 Md. 293, 18 A. 39 (1889)." 282 Md. at 138.

In *Kujawa v. Baltimore Transit Co.*, 224 Md. 195, 167 A.2d 96 (1961), Judge Horney said for the Court:

> "A juror to be competent need not be devoid of all beliefs and convictions. All that may be required of him is that he shall be without bias or prejudice for or against the parties to the cause and possess an open mind to the end that he may hear and consider the evidence produced and render a fair and impartial verdict thereon. *Garlitz v. State*, 71 Md. 293, 18 [A.] 39 (1889)." 224 Md. at 201.

In *Brown v. State*, 220 Md. 29, 150 A.2d 895 (1959), Judge Hammond said for the Court:

> "All the jurors had already said that they had not formed or expressed any opinion as to the guilt or innocence of the accused, and the fact that a prospective juror has read or heard accounts concerning the accused or the crime does not of itself disqualify him or raise any presumption of prejudice. *Bryant v. State*, 207 Md. 565, 577-579; *Piracci v. State*, 207 Md. 499, 511-512; *Grammer v. State*, 203 Md. 200, 209." 220 Md. at 34.

Calhoun does not tell us that the juror in question was asked, "If you are not satisfied of the defendant's guilt even if you felt maybe he probably did it or you suspected he probably did it, would you nonetheless vote for acquittal?" He replied in the affirmative.

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We perceive no error upon the part of the trial judge.

iv Approver

Calhoun has seized upon Code (1957) Art. 27, § 635 which states:

> "No conviction or attainder shall work corruption of blood or forfeiture of estate; the estate of such persons as shall destroy their own lives shall descend or vest as in case of natural death; if any person be killed by casualty there shall be no forfeiture in consequence thereof; *and approver shall never be admitted in any case whatsoever*, and a sentence of death shall not be executed in less than twenty days after judgment." (emphasis added).

With the exception of the fact that the section originally began with the word "that," no change has been made in the statute since its original enactment by Ch. 138, § 10 of the Acts of 1809. That chapter extensively revised the criminal law of Maryland.

By Calhoun's "express direction, it is contended that this provision placed an affirmative obligation on the trial court to bar the testimony of the accomplice Smallwood."

The ancient practice of approver is explained in 4 W. Blackstone, *Commentaries* *329:

> "But there is another species of confession which we read much of in our ancient books, of a far more complicated kind, which is called *approvement*. And that is when a person indicted of treason or felony, and arraigned for the same, doth confess the fact before plea pleaded, and appeals or accuses others, his accomplices, in the same crime in order to obtain his pardon. In this case he is called an *approver* or prover, *probator*, and the party appealed or accused is called the *appellee*. Such approvement can only be in capital offences; and it

is, as it were, equivalent to an indictment, since the appellee is equally called upon to answer it: and if he hath no reasonable and legal exceptions to make to the person of the approver, which indeed are very numerous, he must put himself upon his trial, either by battle or by the country, and if vanquished or found guilty must suffer the judgment of the law, and the approver shall have his pardon *ex debito justitiae*. On the other hand, if the appellee be conqueror or acquitted by the jury, the approver shall receive judgment to be hanged, upon his own confession of the indictment; for the condition of his pardon has failed, viz: the conviction of some other person, and therefore his conviction remains absolute.

"But it is purely in the discretion of the court to permit the approver thus to appeal or not; and, in fact, this course of admitting approvements hath been long disused; for the truth was, as Sir Matthew Hale observes, that more mischief hath arisen to good men by these kind of approvements, upon false and malicious accusations of desperate villains, than benefit to the public by the discovery and conviction of real offenders. And therefore, in the times when such appeals were more frequently admitted, great strictness and nicety were held therein; though since their discontinuance the doctrine of approvements is become a matter of more curiosity than use. I shall only observe that all the good, whatever it be, that can be expected from this method of approvement is fully provided for in the cases of coining, robbery, burglary, house-breaking, horse-stealing, and larceny to the value of five shillings, from shops, warehouses, stables, and coach-houses, by statutes 4 & 5 W. and M. c. 8, 6 & 7 W. III. c. 17, 10 & 11 W. III. c. 23, and 5 Anne, c. 31, which enact that if any such offender, being out of prison, shall discover two or more persons who

> have committed the like offences, so as they may be convicted thereof, he shall, in case of burglary or house-breaking, receive a reward of 40 l., and in general be entitled to a pardon of all capital offences excepting only murder and treason: and of them also in the case of coining. And if any such person, having feloniously stolen any lead, iron, or other metal, shall discover and convict two offenders of having illegally bought or received the same, he shall, by virtue of statute 29 Geo. II. c. 30, be pardoned for all such felonies committed before such discovery. It hath also been usual for the justices of the peace, by whom any persons charged with felony are committed to gaol, to admit some one of their accomplices to become a witness (or, as it is generally termed, king's evidence) against his fellows; upon an implied confidence, which the judges of gaol-delivery have usually countenanced and adopted, that if such accomplice makes a full and complete discovery of that and of all other felonies to which he is examined by the magistrate, and afterwards gives his evidence without prevarication or fraud, he shall not himself be prosecuted for that or any other previous offence of the same degree." *Id.* *329-31 (emphasis in original).

See also 1 J. Bishop, *New Criminal Procedure*, §§ 1156-1163 (1895).

In *Whiskey Cases*, 99 U.S. 594, 25 L. Ed. 399 (1879), the Supreme Court explained somewhat relative to approvers:

> "Speaking upon that subject, Lord Mansfield said, more than a century ago, that there were three ways in the law and practice of that country in which an accomplice could be entitled to a pardon: *First*, in the case of *approvement*, which, as he stated, then still remained a part of the common law, though he admitted it had grown into disuse by

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long discontinuance. *Secondly*, by discovering two or more offenders, as required in the two acts of Parliament to which he referred. *Thirdly*, persons embraced in some royal proclamation, as authorized by an act of Parliament, to which he added, that in all these cases the court will bail the prisoner in order to give him an opportunity to apply for a pardon.

"*Approvers*, as well as those who disclosed two or more accomplices in guilt and those who came within the promise of a royal proclamation, were entitled to a pardon; and the same high authority states that besides those ancient statutory regulations there was another practice in respect to accomplices who were admitted as witnesses in criminal prosecutions against their associates, which he explains as follows: Where the accomplice has made a full and fair confession of the whole truth and is admitted as a witness for the crown, the practice is, if he act fairly and openly and discover the whole truth, though he is not entitled *of right* to a pardon, yet the usage, the lenity, and the practice of the court is to stop the prosecution against the accomplice, the understanding being that he has an equitable title to a recommendation for the king's mercy.

"Subsequent remarks of the court in that opinion showed that the ancient statutes referred to were wholly inapplicable to the case, and that there remained even at that date only the equitable practice which gives a title to recommendation to the mercy of the crown. Explanations then follow which prove that the practice referred to was adopted in substitution for the ancient doctrine of *approvement*, modified and modelled so as to be received with greater favor. As modified it gives, as the court said in that case, a kind of hope to the accomplice that if he behaves fairly and discloses

> the whole truth, he may, by a recommendation to mercy, save himself from punishment and secure a pardon, which shows to a demonstration that the protection, if any, to be given to the accomplice rests on the described usage and his own good behavior; for if he acts in bad faith, or fails to testify fully and fairly, he may still be prosecuted as if he had never been admitted as a witness. *Rex v. Rudd*, 1 Cowp. 331; s. c. 1 Leach, 115.
>
> "Great inconvenience arose from the practice of *approvement*, in consequence of which a mode of proceeding was adopted in analogy to that law, by which an accomplice may be entitled to a recommendation to mercy but not to a pardon as of legal right, nor can he plead it in bar or avail himself of it on his trial. 2 Hawk. P. C. n. 3, p. 532; 3 Russ. on Crimes (9th Am. ed.), 596." 99 U.S. at 599-600 (emphasis in original).

In *Byrd v. Commonwealth*, 4 Va. (2 Va. Cases) 490 (1826), the court stated:

> "It is a mistake to suppose that the competency of accomplices depends on, or grew out of, the doctrine of approvement. An approver is one who being indicted for treason, or felony, and arraigned, confesses the fact before he pleads, and accuses others, his accomplices, in order to obtain his pardon. His approvement is equivalent to an Indictment, and if he supports it in all respects, and the person accused by him is found guilty, the approver is *entitled* to his pardon, but if he is acquitted, the approver receives judgment to be hanged, upon his own confession of the Indictment. 4 *Bl. Com.* 329; *Rudd's* Case, 1 *Leach*, 115. An accomplice, who voluntarily gives his evidence, is not exonerated from punishment, nor entitled to a pardon, if he succeeds in convicting a fellow prisoner, nor is he subjected to punishment in consequence of his

> failure. In both cases, his acquittal, or his conviction, depends on the evidence to be adduced on his own trial. His competency depends on the ancient principle of the Common Law, before averted to, that no person is to be excluded from giving evidence on account of infamy, unless he has been *convicted* of an infamous crime." 4 Va. (2 Va. Cases) at 493 (emphasis in original).

In *Commonwealth v. Dabney*, 40 Va. (1 Rob.) 696, 706 (1842), the court referred to a legislative enactment stating that "'approvers shall never be admitted in any case whatsoever,'" stating that the legislature had thus "manifested its disapprobation of holding out impunity [sic] to an accomplice, as an inducement to him to become a witness against his associates." The opinion concluded by stating, "[A]n accomplice has no right to demand such a recommendation, merely because he has given evidence on the part of the commonwealth, fully, candidly and impartially." *Id.* at 708. The Court of Special Appeals has had a similar issue before it in *Oliver v. State*, 53 Md. App. 490, 500-03, 454 A.2d 856 (1983).

The statute in question merely made it plain that the practice of approvement would not be permitted in this State. It is not authority for holding that the testimony of an accomplice is not admissible against those with whom he was associated in a criminal act.

v Three aggravating factors based on identical facts

The jury found three of the aggravating factors spelled out in Maryland Code (1957, 1982 Repl. Vol.) Art. 27, § 413 (d): that the victim was a law enforcement officer who was murdered while in the performance of his duties; that the defendant committed the murder in furtherance of an escape from or an attempt to escape from or evade the lawful custody, arrest or detention of or by an officer or guard of a correctional institution or by a law enforcement officer; and

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that the defendant committed the murder while committing or attempting to commit robbery. It is argued:

> "It is obvious that three aggravating factors were being urged from a single fact pattern. The practical effect of this is that in virtually every instance involving the murder of a police officer there will be two or three aggravating factors simply because it is unlikely that a police officer will be shot during the performance of his duties unless the shooter is attempting to evade arrest for some other crime. To allow such a procedure defeats the purpose of separate aggravating factors, which is to provide the possibility of enhanced punishment on the basis of discrete instances of specified conduct." (footnote omitted).

Calhoun cites *State v. Rust*, 197 Neb. 528, 538, 250 N.W.2d 867, 874 (1977), for the proposition that "it is not reasonable to construe the definitions in such a manner as to make them overlap and make the same identical facts constitute two aggravating circumstances." He also asserts, citing *Clark v. State*, 379 So. 2d 97 (Fla. 1979), that "it has been held that where a murder is committed in the course of a robbery where money is taken only one of the two aggravating factors of murder in the course of robbery and murders for pecuniary [gain] may be applied." From this it is asserted:

> "The evidence in this case arguably showed that the murder in this case was committed under circumstances which permitted the possibility of enhancement of the punishment from life imprisonment to death. However, there was no basis for permitting the pyramiding of aggravating factors based on precisely the same act. Such a procedure increases the chance of imposition of capital punishment without showing conduct any more dangerous or antisocial than would be present for a single aggravating factor."

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The statement attributed to *Clark* is correct. The statement attributed to *Rust* is likewise correct but it is of interest to note the next succeeding paragraph:

> "We believe the Legislature intended by each definition to convey a different concept, at least to the extent that some added different and important element, e.g., motive or purpose, is included in each separate definition even though some fact or facts in a particular case may pertain to more than one of the definitions, e.g., pecuniary gain may be the result." 197 Neb. at 538.

As the State argues, the protection of police officers is a valid societal objective. This is promoted by the first aggravating circumstance in this case. As to the second aggravating factor, that of committing a murder in furtherance of an escape, it can be seen that this could apply to the murder of a civilian just as easily as to the murder of a police officer. In fact, that is precisely the situation which existed in *Rust*. By the same token, the murder of a police officer is not necessarily limited to an escape situation. An individual might be on the prowl with the objective of shooting down a police officer because of a past actual or fancied grievance or, as the State suggests, a roof top sniper, selecting randomly, could make a police officer a victim. The added element here is the conduct of attempting to escape apprehension, which justifies the use of both aggravating factors.

The third aggravating factor, murder committed during the commission of a robbery, does not need a law enforcement officer as a victim. It likewise does not need to be committed during an escape from lawful custody. The General Assembly through this aggravating factor seeks to deter a robbery.

An example of overlapping aggravating factors is found in *State v. Goodman*, 298 N.C. 1, 257 S.E.2d 569 (1979). There the statutory "(e) (4)" factor was that "[t]he capital felony was committed for the purpose of avoiding or preventing a

lawful arrest. . . ." N.C. Gen. Stat. § 15A-2000 (e) (4) (1980). The "(e) (7)" factor was that the "felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws." *Id.* § 15A-2000 (e) (7). These have more of a similarity than do the factors at issue in the case at bar. In that instance the court said:

> "In submitting the issue under (e) (4), the court reviewed the evidence tending to show that on the night in question while defendant, Lois, Charles and Collins were on Rural Paved Road 2007 in Cumberland County, that Collins was shot and received some cuts to his body; that defendant and Charles then made statements to the effect that they did not want to be arrested for anything; and that they therefore proposed to take Collins to Robeson County so that he could not tell on them. The court then instructed the jury that if they found those to be the facts beyond a reasonable doubt, and believed that to be an aggravating circumstance, then they should answer the issue 'yes'.
>
> "In submitting the issue under (e) (7), the trial court reviewed substantially the same evidence. The court then instructed the jury that if they found those to be the facts beyond a reasonable doubt and believed that to be an aggravating circumstance, then they should answer the issue 'yes'.
>
> "We think the submission of the two issues on the same evidence was improper. This amounted to an unnecessary duplication of the circumstances enumerated in the statute, resulting in an automatic cumulation of aggravating circumstances against the defendant." 298 N.C. at 28-29.

The court went on to say in that case:

> "We do not intend to imply that the aggravating circumstances enumerated in G.S. 15A-2000 (e) can never overlap or that more than one of them can

> never arise from a single incident. We realize that in some cases the same evidence will support inferences from which the jury might find that more than one of the enumerated aggravating circumstances is present. This duality will normally occur where the defendant's motive is being examined rather than where the state relies upon a specific factual element of aggravation." 298 N.C. at 30.

In its determination of facts the jury might well have found that there was no attempt to apprehend and therefore no escape from apprehension. Moreover, the General Assembly was entitled to make the legislative judgment as to capital punishment that such facts could and should be considered as aggravating factors. It was not error to submit each aggravating factor to the jury for consideration.

vi Alleged error in not instructing the jury as to the procedure if it could not agree

Art. 27, § 413 (k) (2) provides, "If the jury, within a reasonable time, is not able to agree as to sentence, the court shall dismiss the jury and impose a sentence of imprisonment for life." Section 413 (c) (3) provides,

> "After presentation of the evidence in a proceeding before a jury, in addition to any other appropriate instructions permitted by law, the court shall instruct the jury as to the findings it must make in order to determine whether the sentence shall be death or imprisonment for life and the burden of proof applicable to these findings in accordance with subsection (f) or (h)."

From this Calhoun argues that the trial judge erred in this instance because the trial judge did not instruct the jury that if they could not agree within a reasonable time a life sentence would be imposed.

As in subsection iii of this opinion, there is a short and a long answer to Calhoun's contention. The short answer is

that no request for such instruction was made at trial nor was any objection made upon that basis to the instructions which were given as required by Rule 757 (f). Rule 757 (h) provides that an objection is not reviewable as of right unless it is made in compliance with Rule 757 (f). We are urged that we should take cognizance of this as "plain error" within the meaning of Rule 757 (h). In *State v. Hutchinson*, 287 Md. 198, 203, 411 A.2d 1035 (1980), we indicated that an appellate court should take cognizance of unobjected to error only when the error is so "compelling, extraordinary, exceptional or fundamental [as] to [deny] the defendant a fair trial." There is no such error in this case. Because this is a capital case in which we are affirming a sentence of death, however, we shall give the long answer to Calhoun's contention.

In this case the jury deliberated for two and a half hours. It then advised the court that it " 'need[ed] a time for individual reflection and therefore request[ed] adjournment overnight or until whenever the Court decide[d].' " This request was made at 5:33 p.m. The court answered by advising that they must remain together but if they desired to suspend and go to dinner that would be an appropriate time. They advised they would like to go to dinner. They were excused for dinner. Court recessed until 7:30 p.m. The jury returned with a verdict at 9:15 p.m.

The Supreme Court of South Carolina recently considered such an issue in *State v. Copeland*, S.C. , 300 S.E.2d 63 (1982), *cert. denied*, U.S. , 103 S. Ct. 1802 (1983):

> "Appellant Copeland argues the trial judge erred in denying his request to instruct the jury of the actual effect of failure to reach a unanimous agreement as to the punishment, and in instructing the jury that unanimity is required before a life sentence can be imposed. Copeland asserts the judge misstated the applicable law and inserted an arbitrary factor into the jury's sentencing decision by instructing 'irrespective of what your verdict or recommendation is, it must be unanimous on each

count, that is, your verdict or recommendation must be the verdict or recommendation of all twelve of you.' Allegedly, this instruction might affect the jury's decision to impose life or death unless the jury is instructed that, in the event all cannot agree on a recommendation as to whether the death penalty should be imposed, the trial judge shall dismiss the jury and sentence the defendant to life imprisonment. We disagree.

"The trial judge correctly stated the applicable law. We stated in *State v. Adams* [277 S.C. 115], 283 S.E.2d [582,] 587 [(1981)]:

> The language of [§ 16-3-20 (C)] provides that where a sentence of death is not recommended by the jury, a life sentence must be given. The situation implicitly envisioned here is that normally the jury will unanimously either recommend life or death. The undecided jury is the exception. That portion of the statute addressing the legal effect given to the existence of an unalterably divided jury is addressed to the trial judge only and need not be divulged to the jury.

There is no error present." S.C. , 300 S.E.2d at 70-71.

Giving the instruction to the jury before deliberation could prompt someone to hold out for just a bit more than a reasonable time to insure that the death penalty was not imposed. It likewise could cause a jury to rush through its deliberations to avoid being called back by the court and told that because a reasonable time had passed without a verdict the sentence would be life imprisonment. The statute is a mandate directed to the court, not the jury. As the jury here reached its decision within a reasonable time, no instruction was required.

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vii Opening statement

At the sentencing phase of the trial defense counsel in his opening statement to the jury said, "There can be in this proceeding no hung jury because if the jury is not able to decide —." This brought an immediate objection. His co-counsel responded that that was the law. This produced another objection, after which the trial judge said, "I don't think that has anything to do with an opening statement or factual [recitation]." The trial judge was correct. The purpose of an opening statement is to orient the jurors so that they can follow and understand the evidence as it unfolds during the trial. It is not the purpose of an opening statement to argue the merits of the case or to discuss the pertinent law. 3 *Wharton's Criminal Procedure* §§ 493, 494 (12th ed. C. Torcia, 1975).

viii Evidence at sentencing hearing of misconduct at Montgomery County Detention Center

Calhoun takes exception to evidence admitted in the sentencing proceeding relative to an incident at the Montgomery County Detention Center in August 1981. The shift commander at the center, Sergeant Gary Hunt, was called as a witness. The record then states:

> "Q Sergeant Hunt, I would like you to go back to August in 1981 and ask you if sometime in that month you had a confrontation with the defendant?
>
> "MR. TOWNSEND: I object. It's no relationship to any of the specifications of aggravating circumstances under the circumstances.
>
> "THE COURT: Overruled.
>
> "I will allow it on the question of whether or not it poses a danger.
>
> "MR. TOWNSEND: As a mitigating circumstance?
>
> "THE COURT: No, as the circumstances which the State may establish under Article 27, Section 413(c)3.

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"MR. TOWNSEND: The only reason I make the point, Your Honor, it's my understanding that the consent [sic] of dangerousness in the statute comes in as non-dangerousness as a mitigating circumstance.

"MR. HAMILTON: [1] I think the State, however, is entitled to disprove the existence of any mitigating factors set out in the statute. As long as he is provided a fair opportunity to rebut it. I'll allow."

The correctional officer related that on August 17 he went to the cell of Calhoun "to read Mr. Calhoun a notice of institutional infraction, a violation of jail rules." The record then is:

"A ... Before I could say much of anything, Mr. Calhoun made a remark to me as —

"Q Do you know what he said?

"A Yes. He said quote unquote, he said 'Get that shit out of my cell.' I presumed he meant the paper in my hand. He rose from his bunk upon which he had been sitting and took a plastic bottle, a Wella-Balsam bottle used for hand lotion and squirted me in the face and arms and chest with a foul concoction which we later learned to be a mixture of urine and [feces]. It hit me and hit the officer standing with me at the entrance of his cell. And we retreated from his cell at that point.

"Q Is that the end of the incident?

"A No, it was not.

We determined that his continued possession of that bottle of substance posed a danger to any officer who might have occasion on that shift or some subsequent shift to approach his cell. And we

1. Mr. Hamilton was the prosecutor. This is an obvious error on the part of the stenographer who either meant "The Court" or omitted to specify "The Court" before the last sentence.

decided to go in and ask him for it and give him an opportunity to be handcuffed and have himself searched. And he refused to cooperate with our efforts.

"Q Did he do anything else with the bottle?

"A Yes.

When we approached his cell, we told him what we expected of him. We gave him an opportunity to be handcuffed peacefully, to submit to a cell search and a body search, strip search. And he refused to do so. In fact, as we did so, he continued to squirt the same stuff from the same bottle on us again. At that time, we used chemical mace as we had previously warned that we would do."

Evidence admissible in a sentencing proceeding is set forth in Code (1957, 1982 Repl. Vol.) Art. 27, § 413 (c) (1):

"(i) Evidence relating to any mitigating circumstance listed in subsection (g);

"(ii) Evidence relating to any aggravating circumstance listed in subsection (d) of which the State had notified the defendant pursuant to § 412 (b);

"(iii) Evidence of any prior criminal convictions, pleas of guilty or nolo contendere, or the absence of such prior convictions or pleas, to the same extent admissible in other sentencing procedures;

"(iv) Any presentence investigation report. However, any recommendation as to sentence contained in the report is not admissible; and

"(v) Any other evidence that the court deems of probative value and relevant to sentence, provided the defendant is accorded a fair opportunity to rebut any statements."

This incident could not pertain to any aggravating circumstance set forth in the statute. The mitigating circumstance set forth in § 413 (g), relevant to this proceeding, is subsec-

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tion (1), that "[t]he defendant has not previously (i) been found guilty of a crime of violence; (ii) entered a plea of guilty or nolo contendere to a charge of a crime of violence; or (iii) had a judgment of probation on stay of entry of judgment entered on a charge of a crime of violence." The statute then goes on to define the term "crime of violence" as meaning, "abduction, arson, escape, kidnapping, manslaughter, except involuntary manslaughter, mayhem, murder, robbery, or rape or sexual offense in the first or second degree, or an attempt to commit any of these offenses, or the use of a handgun in the commission of a felony or another crime of violence."

Calhoun in his argument to us did not and could not rely upon our recent decision in *Scott v. State*, 297 Md. 235, 465 A.2d 1126 (1983), for the simple reason that it was not decided until some months subsequent to argument in this case, although obviously he could have raised the issue we addressed in *Scott*. As Judge Davidson put it for the Court in *Scott*, that case presented "the question whether, under Maryland Code (1957, 1982 Repl. Vol.) Art. 27, § 413 (c) (1), evidence is admissible at a sentencing proceeding to show that an accused convicted of premeditated murder has committed other unrelated crimes for which the accused has not been convicted or pleaded guilty or nolo contendere." 297 Md. at 242. Scott there claimed, "that under § 413 (c) (1) (i) and § 413 (c) (1) (iii), admissible evidence of unrelated crimes is restricted to evidence of prior convictions, pleas of guilty or pleas of nolo contendere." 297 Md. at 243. The Court took pains in *Scott* to distinguish *Johnson v. State*, 292 Md. 405, 439 A.2d 542 (1982), where we considered, as the Court put it in *Scott*, "whether, under § 413 (c) (1) (v), evidence is admissible at a sentencing proceeding to show that an accused, convicted a premeditated murder, has committed other unrelated crimes for which the accused has not been convicted." *Id.* The Court pointed out that in Johnson "[t]he accused . . . did not there contend that under § 413 (c) (1) (i) and § 413 (c) (1) (iii) admissible evidence of unrelated crimes was restricted to evidence of prior convictions, pleas of guilty

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or pleas of nolo contendere and consequently that the evidence of the unrelated crime was inadmissible because, although charged with the murder, the accused had not been convicted." 297 Md. at 245. The Court said in *Scott:*

> "Thus, § 413 (c) (1) (iii) establishes a more stringent standard of reliability for the admission of such evidence in a death penalty case than is applied in a nondeath penalty case. It precludes, in a death penalty case, any but the most reliable type of evidence of unrelated crimes — a conviction. Additionally, § 413 (c) (1) (iii) precludes, in a death penalty case, inflammatory detailed evidence of the underlying facts and circumstances surrounding unrelated crimes. As a result, § 413 (c) (1) (iii), like § 413 (c) (1) (i), serves the purpose of moderating the significantly prejudicial nature of evidence of unrelated crimes in the face of the unique severity of the death penalty." 297 Md. at 247.

It is obvious from an examination of the objection of defense counsel that at no time did he raise the issue that was raised in *Scott*, that this was an attempt to elicit information pertaining to a criminal act on the part of Calhoun for which there had been no conviction or disposition tantamount to a conviction. It also can be seen from the record quoted above that the objection was narrowed by defense counsel to whether the incident at the detention center was relevant to "a mitigating circumstance." The court overruled the objection saying that the testimony concerned a circumstance "which the State may establish under Article 27, Section 413 (c)3." The trial judge presumably was referring to § 413 (c) (1) (iii) ("Evidence of any prior criminal convictions, pleas of guilty or nolo contendere, or the absence of such prior convictions or pleas, to the same extent admissible in other sentencing procedures") since § 413 (c) (3) states:

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"(3) After presentation of the evidence in a proceeding before a jury, in addition to any other appropriate instructions permitted by law, the court shall instruct the jury as to the findings it must make in order to determine whether the sentence shall be death or imprisonment for life and the burden of proof applicable to these findings in accordance with subsection (f) or (h)."

Counsel made no general objection. His specific objection was that this bore no relationship to the specified aggravating circumstances. In *von Lusch v. State*, 279 Md. 255, 264, 368 A.2d 468 (1977), we said, "[W]here counsel clearly states specific grounds for an objection without a request by the trial court, he waives the right to challenge the evidence on other grounds . . . ." The conduct of Calhoun in this instance, if established in a criminal proceeding against him, would be the common law offense of battery. *See* W. LaFave & A. Scott, *Criminal Law* 604 (1972) and R. Perkins, *Criminal Law* 107 (2d ed. 1969). The record here is silent as to whether Calhoun has or has not been charged and tried as a result of this incident. It is entirely conceivable that had the objection here been based upon the issue before the Court in *Scott*, 297 Md. 235, that the State might well have produced evidence of such a conviction. On the other hand, it might have been obliged to admit that no criminal charges had been brought as a result of the incident or that charges had been brought but the case had not come to trial.

In the absence of an objection focusing on the point before the Court in *Scott*, the evidence here was admissible under Art. 27, § 413 (c) (1) (v), which permits introduction of, "Any other evidence that the court deems of probative value and relevant to sentence, provided the defendant is accorded a fair opportunity to rebut any statements."

ix Constitutional issues

Calhoun launches a broad based constitutional attack. We shall consider his points seriatim.

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A

He first contends that our "capital punishment statute violates the Eighth and Fourteenth Amendments of the U.S. Constitution and Articles 16 and 25 of the Maryland Declaration of Rights in failing to provide standards to govern the exercise of discretion under Article 27, Sec. 412 (b) to initiate a death case."

Calhoun's first basis for his claim of unconstitutionality stems from what he describes as the prosecutor's "unbridled exercise of discretion," referring to Art. 27, § 412 (b). That subsection provides:

> "A person found guilty of murder in the first degree shall be sentenced either to death or to imprisonment for life. The sentence shall be imprisonment for life unless (1) the State notified the person in writing at least 30 days prior to trial that it intended to seek a sentence of death, *and* advised the person of each aggravating circumstance upon which it intended to rely, and (2) a sentence of death is imposed in accordance with § 413." (Emphasis added.)

According to Calhoun the lack of specific standards results in an inconsistent and discriminatory application of the death penalty statute by prosecutors in violation of the limitations set by the Supreme Court in *Furman v. Georgia*, 408 U.S. 238, 92 S. Ct. 2726, 33 L. Ed. 2d 346 (1972), and *Gregg v. Georgia*, 428 U.S. 153, 96 S. Ct. 2909, 49 L. Ed. 2d 859 (1976).

The State, on the other hand, argues that the Maryland statutes, specifically § 412, are in accord with *Furman* and *Gregg*. Because of the checks provided by the sentencing authority and the mandatory appellate review, the Supreme Court in *Gregg* and the several opinions filed the same day gave prosecutors wide discretion in charging capital crimes. The State claims also that to apply strict standards would result in the type of mandatory system outlawed by the Supreme Court in *Woodson v. North Carolina*, 428 U.S. 280,

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96 S. Ct. 2978, 49 L. Ed. 2d 944 (1976), and *Roberts (Stanislaus) v. Louisiana*, 428 U.S. 325, 96 S. Ct. 3001, 49 L. Ed. 2d 974 (1976).

An analysis of the issue begins with *Furman*. There the Supreme Court in a per curiam opinion declared statutes unconstitutional which gave judges and juries uncontrolled discretionary power to impose the death sentence. Although every Justice wrote an opinion in *Furman*, no one specifically attacked the power given to prosecutors in choosing which cases qualified as capital crimes, but rather references were made only to the "sentencing authority."

Subsequently in *Gregg* the specific issue of the prosecutor's discretion was raised by the petitioner, who claimed that the Georgia statute gave the state prosecutor "unfettered authority to select those persons whom he wishes to prosecute for a capital offense and to plea bargain with them." 428 U.S. at 199. Justice Stewart, who wrote the plurality opinion for the Court, stated in response:

> "The existence of these discretionary stages is not determinative of the issues before us. At each of these stages an actor in the criminal justice system makes a decision which may remove a defendant from consideration as a candidate for the death penalty. *Furman*, in contrast, dealt with the decision to impose the death sentence on a specific individual who had been convicted of a capital offense. Nothing in any of our cases suggests that the decision to afford an individual defendant mercy violates the Constitution. *Furman* held only that, in order to minimize the risk that the death penalty would be imposed on a capriciously selected group of offenders, the decision to impose it had to be guided by standards so that the sentencing authority would focus on the particularized circumstances of the crime and the defendant." 428 U.S. at 199.

In a footnote Justice Stewart made clear that strict standards imposed on a prosecutor would result in an ineffective and unconstitutional system:

> "The petitioner's argument is nothing more than a veiled contention that *Furman* indirectly outlawed capital punishment by placing totally unrealistic conditions on its use. In order to repair the alleged defects pointed to by the petitioner, it would be necessary to require that prosecuting authorities charge a capital offense whenever arguably there had been a capital murder and that they refuse to plea bargain with the defendant. . . . Such a system, of course, would be totally alien to our notions of criminal justice.
>
> "Moreover, it would be unconstitutional. Such a system in many respects would have the vices of the mandatory death penalty statutes we hold unconstitutional today in *Woodson v. North Carolina*, *post*, p. 280, and *Roberts v. Louisiana*, *post*, p. 325. . . ." 428 U.S. at 199-200 n. 50.

Justice White wrote a concurring opinion in *Gregg* which was joined by the Chief Justice and by Justice Rehnquist. It is of interest to note the analysis of prosecutorial discretion set forth by Justice White:

> "Petitioner's argument that prosecutors behave in a standardless fashion in deciding which cases to try as capital felonies is unsupported by any facts. Petitioner simply asserts that since prosecutors have the power not to charge capital felonies they will exercise that power in a standardless fashion. This is untenable. Absent facts to the contrary, it cannot be assumed that prosecutors will be motivated in their charging decision by factors other than the strength of their case and the likelihood that a jury would impose the death penalty if it convicts. Unless prosecutors are incompetent in their judgments, the standards by which they decide whether to charge a capital felony will be the same as those by which the jury will decide the questions of guilt and sentence. Thus defendants will escape the death penalty through prosecutorial

> charging decisions only because the offense is not sufficiently serious; or because the proof is insufficiently strong. This does not cause the system to be standardless any more than the jury's decision to impose life imprisonment on a defendant whose crime is deemed insufficiently serious or its decision to acquit someone who is probably guilty but whose guilt is not established beyond a reasonable doubt." 428 U.S. at 225.

On the basis of *Gregg*, claims of unconstitutional prosecutorial discretion under *Furman* were rejected in two plurality opinions in death penalty cases written by Justice Stewart filed the same day as *Gregg*. *Proffitt v. Florida*, 428 U.S. 242, 254, 96 S. Ct. 2960, 49 L. Ed. 2d 913 (1976); *Jurek v. Texas*, 428 U.S. 262, 274, 96 S. Ct. 2950, 49 L. Ed. 2d 929 (1976).

We have not specifically dealt with the issue of prosecutorial discretion. However, in *Tichnell v. State*, 287 Md. 695, 720-29, 415 A.2d 830 (1980) (*Tichnell I*) we found that the Maryland statute does satisfy both federal and state requirements on its face.

Absent any specific evidence of indiscretion by prosecutors resulting in an irrational, inconsistent, or discriminatory application of the death penalty statute, Calhoun's claim cannot stand. To the extent that there is a difference in the practice of the various State's attorneys around the State, our proportionality review would be intended to assure that the death penalty is not imposed in a disproportionate manner.

Finally, Calhoun claims that the notice requirement of § 412 differs from "charging" the defendant as discussed by the Supreme Court in *Gregg*. The written notice is a procedure required for the defendant's benefit. It ensures that there are sufficient grounds for the charges and that the defendant has notice of those grounds. The Supreme Court does not require such notice to protect the constitutionality of the death penalty statute. Therefore, the additional formality of § 412 should not be held against the State.

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We hold that Code (1957, 1982 Repl. Vol.) Art. 27, § 412 as presently applied does not violate the Eighth and Fourteenth Amendments to the Constitution of the United States or Articles 16 and 25 of the Maryland Declaration of Rights.

B

Calhoun contends that he "is denied due process of law by the failure of the Maryland Capital Punishment Statute, on its face and in its operation, to provide a means of culling those 'similar cases' which this Court must consider under Code (1957, 1982 Repl. Vol.) Art. 27, Sec. 414 (e) (4)."

Calhoun argues that the provision by the General Assembly for proportionality review is unconstitutional because the statute fails to provide this Court with the means to discharge effectively its obligation to review similar cases. In other words, he is contending that the Legislature has failed to provide a means for defining the "relevant universe" of cases that we should consider in determining whether a particular sentence of death is excessive or arbitrary. By Rule 772A we have provided that trial judges in capital cases are to file a report with us in writing. The rule sets forth in substantial detail that which is to be included in the report. Calhoun contends that Rule 772A is inadequate because it fails to identify all relevant cases. He maintains that relevant cases should include not only those in which the State actually sought the death penalty but also those in which the State either withdrew its intent to seek capital punishment or chose not to seek the death penalty even though a case was ostensibly "similar." Finally, he argues that § 414 (e) (4) has deprived him of his due process right to be heard in a meaningful manner: although the statute extends the right to proportionality review, its failure to provide a means to give content to the right results in an effective denial of due process.

The State contends that the purpose of proportionality review is to determine whether the imposition of the death sentence in a particular case is aberrant or irrational. As

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long as the death penalty has been imposed under similar circumstances, it is not important that a life sentence was given in another similar case. Further, the State notes that the United States Supreme Court has upheld death penalty statutes containing no provisions for proportionality review. Rather, the Court has stressed that due process and the Fourteenth Amendment require only that the death penalty not be imposed in a "wanton" or "freakish" manner; the type of statute providing for appellate review is not material.

In several cases the Supreme Court has noted the requirement that the death penalty must be imposed in a rational and consistent manner. Although the Court appears not to require proportionality review per se, it does seem to be saying that appellate review of capital punishment cases is essential to the constitutionality of the death penalty statutes. In its recent opinions it has dwelt upon the fact that review by a state's highest court was provided. *See, e.g., Jurek*, 428 U.S. 262; *Proffitt*, 428 U.S. 242; *Gregg*, 428 U.S. 153. Even where the Court has overturned the decision of a state court of last resort on the basis of an inconsistent standard applied in capital punishment cases, it has not articulated specific means by which state courts are to arrive at consistent results. *Cf. Godfrey v. Georgia*, 446 U.S. 420, 428, 100 S. Ct. 1759, 64 L. Ed. 2d 398 (1980) (State must provide sentencing authority " 'clear and objective standards' that provide 'specific and detailed guidance,' and that make 'rationally reviewable the process for imposing a sentence of death.' "). Indeed, it appears that the Supreme Court has left it to the state legislatures and courts to determine the method by which the death penalty is to be imposed in a rational manner.

In *Gregg*, 428 U.S. 153, the petitioner argued that the requirements of *Furman*, 408 U.S. 238, were not met "because the jury has the power to decline to impose the death penalty even if it finds that one or more statutory aggravating circumstances are present in the case." *Gregg*, 428 U.S. at 203. To this the plurality opinion said:

> "This contention misinterprets *Furman*. See *supra*, at 198-199. Moreover, it ignores the role of the

> Supreme Court of Georgia which reviews each death sentence to determine whether it is proportional to other sentences imposed for similar crimes. Since the proportionality requirement on review is intended to prevent caprice in the decision to inflict the penalty, the isolated decision of a jury to afford mercy does not render unconstitutional death sentences imposed on defendants who were sentenced under a system that does not create a substantial risk of arbitrariness or caprice." 428 U.S. at 203.

The plurality opinion in *Gregg* further noted:

> "The provision for appellate review in the Georgia capital-sentencing system serves as a check against the random or arbitrary imposition of the death penalty. In particular, the proportionality review substantially eliminates the possibility that a person will be sentenced to die by the action of an aberrant jury. If a time comes when juries generally do not impose the death sentence in a certain kind of murder case, the appellate review procedures assure that no defendant convicted under such circumstances will suffer a sentence of death." 428 U.S. at 206.

See also Jurek, 428 U.S. at 276 (opinion of Stewart, J.) (prompt judicial review of jury's sentencing decision acts as a safeguard against the arbitrary and capricious imposition of the death sentence); *Proffitt*, 428 U.S. at 258-59 (same).

Based on the broad and general statements of the United States Supreme Court regarding proportionality review we have articulated the standard we shall apply under the similar cases provision of Art. 27, § 414 (e) (4). *See Tichnell v. State*, 297 Md. 432, A.2d (1983) (*Tichnell III*). The analysis of proportionality review by Chief Judge Murphy in *Tichnell III* basically consists of three parts. First, he

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reviewed for the Court the United States Supreme Court cases that have confronted the issue of proportionality review and concluded that "the essential principle underlying the varieties of proportionality review upheld in *Gregg Profitt* and *Jurek* is, in short, the guarantee that death sentences will be imposed in a reasonably consistent manner. *Tichnell [v. State]*, 287 Md. [695,] 741 [, 415 A.2d 830 (1980)]." 297 Md. at 460. Second, Chief Judge Murphy reviewed for the Court the manner in which those states with proportionality review statutes similar to ours have defined the "relevant universe" of cases. 297 Md. at 461-64. Third, the Court concluded:

> "[T]he legislatively intended inventory of cases from which 'similar cases' are to be culled encompasses only those first degree murder cases in which the State sought the death penalty under § 413, whether it was imposed or not. This interpretation of § 414 (e) (4) is consistent with the implementing provisions of Maryland Rule 772A which requires, for purposes of proportionality review, that trial judges file detailed informational reports only in such cases.
>
> "The focus of § 414 (e) (4) is upon capital cases in which the sentencing authority determined whether to impose a life or death sentence; the subsection aims to assure that upon consideration of both the crime and the defendant the aggravating and mitigating circumstances present in one capital case will lead to a result similar to that reached under similar circumstances in another capital case, thus identifying the aberrant sentence and avoiding its ultimate imposition. This, of course, is the constitutional purpose of proportionality review as articulated in *Gregg* and *Proffitt* and as to which we think the General Assembly intended to subscribe in enacting § 414 (e) (4). No case is potentially similar within the contemplation of the statute, therefore, unless the death penalty was an authorized punishment." 297 Md. at 464-65.

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The Court restricted the analysis of similar cases to those "decided under constitutional death penalty statutes and to those decided under our own State law." 297 Md. at 462. Finally, we noted that proportionality review will be conducted "in accordance with the fundamental constitutional principle of avoiding the arbitrary or capricious imposition of the death penalty by affording similar treatment to similar capital cases, considering both the crime and the defendant." *Id.*

Under the holding of *Tichnell III*, therefore, Calhoun's contention that § 414 (e) (4) violates due process because of its failure to provide a standard for defining similar cases is unfounded. Rather, from *Tichnell III* and the cases of the Supreme Court of the United States, it appears that similar cases, in terms of a particular accused and particular crime of which he was convicted, are comprised of those involving similar aggravating and mitigating circumstances in which the State sought to have the death penalty imposed and those brought to our attention by defendants.

C

Calhoun contends that our death sentence statute "is unconstitutional because Article 23 of the Declaration of Rights denies this Court the power to exercise the review mandated by Article 27, Sec. 414 (e)."

Calhoun argues that because Article 23 of our Declaration of Rights precludes appellate courts from weighing and balancing the facts of a criminal case, this Court lacks the power to conduct the review authorized by Art. 27, § 414. Article 23 provides in relevant part, "In the trial of all criminal cases, the Jury shall be the Judges of Law, as well as of fact, except that the Court may pass upon the sufficiency of the evidence to sustain a conviction." Calhoun's point is that under § 414 we are to independently assess the findings of the sentencing authority concerning the presence or absence of aggravating and mitigating circumstances and to further review similar cases. It is his claim that in doing this we are

going beyond our limited power to determine the sufficiency of the evidence. Thus, he claims that because proportionality review is prohibited by Article 23 and because that provision is a central, nonseverable feature of the capital punishment statute, the entire statute is unconstitutional. In a footnote Calhoun contends that the fact that the appellate review is of a sentence rather than a determination of guilt is inconsequential because we must engage in the same type of factual inquiry.

The State contends that Article 23 applies only to the evidence necessary to sustain a conviction at trial and not to the review of a criminal sentence. Therefore, it says § 414(e) is a valid exercise of legislative authority and the Court is indeed empowered to conduct the proportionality review.

We first note that most of the cases upon which Calhoun relies were decided prior to the amendment to the Constitution in 1950 giving this Court power to pass upon the sufficiency of the evidence. The issue here was mentioned briefly in *Poole v. State*, 290 Md. 114, 125, 428 A.2d 434 (1981) *(dicta)*. We there stated that Article 23 "applies to the trial stage of the proceeding and refers explicitly to the evidence necessary to sustain a conviction. It does not apply to the jury's role in a sentencing proceeding. *See Stevenson v. State*, 289 Md. 167, 423 A.2d 558 (1980)." *Id.*

In *Stevenson* the question before the Court was "whether Article 23 of the Declaration of Rights to the Maryland Constitution, which provides that the jury in a criminal case 'shall be the Judges of Law, as well as of fact,' is unconstitutional because the provision, as construed by this Court, facially deprives a defendant of the federally secured right to due process of law." *Stevenson v. State*, 289 Md. 167, 169, 423 A.2d 558 (1980). In reaching the conclusion that the grant to the jury of the role of "judges of law" in a criminal case did not violate the Fourteenth Amendment, *id.* at 189, Judge Digges made several observations for the Court about the functions of judge and jury. First, he noted that "the jury was not granted, by Article 23, the power to decide all matters that may be correctly included under the generic label — 'law.' Rather, its authority is limited to deciding 'the

law of the crime,' . . . or 'the definition of the crime,' as well as 'the legal effect of the evidence before [the jury].' " *Id.* at 178 (citations omitted; brackets in original). Second, Judge Digges reviewed for the Court various cases that discussed the role, function, and power of the jury to determine "the law" in a criminal case. He noted that "[i]mplicit in the decisions of this Court limiting the jury's judicial role to the 'law of the crime' is a recognition that all other legal issues are for the judge alone to decide." *Id.* at 179.

Because under *Stevenson* the jury is the judge of the law only in the terms of the law or definition of the crime, it follows that the restriction "except that the Court may pass upon the sufficiency of the evidence to sustain a conviction" goes only to the evidence necessary to sustain a finding of guilt or innocence. Thus, the role of the jury being limited and all other matters being left to the judge, it follows that this Court has the power to review the sentencing process in a capital punishment case.

D

Calhoun claims that "[i]n providing for the sentence of death by administration of lethal gas the Maryland Capital Punishment scheme violates the Eighth and Fourteenth Amendments of the United States Constitution and Articles 16 and 25 of the Maryland Declaration of Rights."

Article 16 of the Maryland Declaration of Rights forbids "inflict[ing] cruel and unusual pains" while Article 25 says that "unusual punishment [shall not be] inflicted . . . ." At issue then is whether the enforcement of our death penalty statute by lethal gas is "cruel and inhuman punishment" as defined by the Federal Constitution and our own Declaration of Rights.

First, under the Eighth and Fourteenth Amendments the Supreme Court has expressly stated that the death penalty is an acceptable form of punishment. In the plurality opinion for the Court in *Gregg*, 428 U.S. 153, Justice Stewart stated:

> "The Court on a number of occasions has both assumed and asserted the constitutionality of capital punishment. . . . But until *Furman v. Georgia*, 408 U.S. 238 (1972), the Court never confronted squarely the fundamental claim that the punishment of death always, regardless of the enormity of the offense or the procedure followed in imposing the sentence, is cruel and unusual punishment in violation of the Constitution. Although this issue was raised and addressed in *Furman*, it was not resolved by the Court. . . . We now hold that the punishment of death does not invariably violate the Constitution." 428 U.S. at 168-69.

In *Gregg* Justice Stewart further said in the plurality opinion:

> "The petitioners in the capital cases before the Court today renew the 'standards of decency' argument, but developments during the four years since *Furman* have undercut substantially the assumptions upon which their argument rested. Despite the continuing debate, dating back to the 19th century, over the morality and utility of capital punishment, it is now evident that a large proportion of American society continues to regard it as an appropriate and necessary criminal sanction.
>
> "The most marked indication of society's endorsement of the death penalty for murder is the legislative response to *Furman*. The legislatures of at least 35 States have enacted new statutes that provide for the death penalty for at least some crimes that result in the death of another person. And the Congress of the United States, in 1974, enacted a statute providing the death penalty for aircraft piracy that results in death." 428 U.S. at 179-80 (footnotes omitted).

It thus seems relevant to comment as to society's view that fourteen out of forty-eight times that the opportunity has

existed to impose the death penalty under our lethal gas statute Maryland juries have done so. Six of the remaining thirty-four times in which life sentences were imposed by juries this result was mandatory by virtue of jury deadlocks. The fact that juries are willing to impose the punishment certainly carries some weight as to society's view of the death penalty as a valid form of punishment.

Later in *Coker v. Georgia*, 433 U.S. 584, 97 S. Ct. 2861, 53 L. Ed. 2d 982 (1977), Justice White said in the plurality opinion of the Court:

> "It is now settled that the death penalty is not invariably cruel and unusual punishment within the meaning of the Eighth Amendment; it is not inherently barbaric or an unacceptable mode of punishment for crime; neither is it always disproportionate to the crime for which it is imposed. It is also established that imposing capital punishment, at least for murder, in accordance with the procedures provided under the Georgia statutes saves the sentence from infirmities which led the Court to invalidate the prior Georgia capital punishment statute in *Furman v. Georgia, supra*." 433 U.S. at 591.

It must not be forgotten that, as pointed out by the Chief Justice in his dissent in *Furman v. Georgia*, 408 U.S. 238:

> "[I]t is . . . clear from the language of the Constitution itself that there was no thought whatever of the elimination of capital punishment. The opening sentence of the Fifth Amendment is a guarantee that the death penalty not be imposed 'unless on a presentment or indictment of a Grand Jury.' The Double Jeopardy Clause of the Fifth Amendment is a prohibition against being 'twice put in jeopardy of life' for the same offense. Similarly, the Due Process Clause commands 'due process of law' before an accused can be 'deprived of life, liberty, or property.'

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> Thus, the explicit language of the Constitution affirmatively acknowledges the legal power to impose capital punishment; it does not expressly or by implication acknowledge the legal power to impose any of the various punishments that have been banned as cruel since 1791. Since the Eighth Amendment was adopted on the same day in 1791 as the Fifth Amendment, it hardly needs more to establish that the death penalty was not 'cruel' in the constitutional sense at that time." 408 U.S. at 380.

No one had heard of death by electrocution or by lethal gas at the time of the adoption of those constitutional provisions. The gallows was the customary method of imposing the death penalty. This was the method in use in Maryland until the more humane method of execution by lethal gas was adopted in 1955. *See* Chapter 625, § 1, Acts of 1955.

The issue now before the Court was considered recently by the Fifth Circuit in *Gray v. Lucas*, 710 F.2d 1048 (5th Cir. 1983). The court said:

> "Gray stresses that neither the Supreme Court nor any federal court has addressed the issue whether the gas chamber constitutes cruel and unusual punishment. In cases decided in the last century, however, the court approved New York's use of the electric chair, *In re Kemmler*, 136 U.S. 436, 10 S. Ct. 930, 34 L. Ed. 519 (1890), and Utah's use of hanging and the firing squad, *Wilkerson v. Utah*, 99 U.S. 130, 25 L. Ed. 345 (1879). In this century, a number of states have upheld the use of the gas chamber. *Duisen v. State*, 441 S.W.2d 688, 693 (Mo. 1969), *modified by Furman v. Georgia*, 408 U.S. 238, 92 S. Ct. 2726, 33 L. Ed. 2d 346 (1972); *People v. Daugherty*, 40 Cal. 2d 876, 256 P.2d 911, *cert. denied*, 346 U.S. 827, 74 S.Ct. 47, 98 L. Ed. 352 (1953); *State v. Jon*, 46 Nev. 418, 211 P. 676 (1923). See also *In Re Anderson*, 69

Cal. 2d 613, 73 Cal. Rptr. 21, 447 P.2d 117, 130 (1968), *cert. denied*, 406 U.S. 971, 92 S. Ct. 2415, 32 L. Ed. 2d 671 (1972). This year, the state of Nevada enacted a statutory provision which abandoned the gas chamber in favor of lethal injection. Nev. Rev. Stat. § 176.355 (1983). Nevada thus joins New Mexico in abandoning the gas chamber in favor of lethal injection. N.M. Stat. Ann. § 31-14-11 (1979). North Carolina allows death-row prisoners to choose between lethal injection or the gas chamber. In 1981, the State of Washington banned further use of hanging as a method of execution. *State v. Frampton*, 95 Wash.2d 469, 627 P.2d 922 (1981).

"Gray argues strongly that he has produced a factual predicate clearly demonstrating that death by cyanide gas, causing asphyxiation at the cost of protracted pain over a period that may exceed seven minutes, may offend an indicated eighth amendment prohibition against the unnecessary and wanton infliction of pain. He contends that, therefore, he is entitled to an evidentiary hearing to prove the facts indicated in order to vindicate his constitutional claim in that regard.

"Accepting Gray's proffered facts as proven, we ultimately conclude that they do not as a matter of law establish the eighth amendment claim asserted by him and, therefore, no evidentiary hearing is required. Traditional deaths by execution, such as by hanging, have always involved the possibility of pain and terror for the convicted person. Although contemporary notions of civilized conduct may indeed cause some reassessment of what degree or length is acceptable, we are not persuaded that under the present jurisprudential standards the showing made by Gray justifies this intermediate appellate court holding that, as a matter of law or fact, the pain and terror resulting from death by cyanide gas is so different in degree or nature from

> that resulting from other traditional modes of execution as to implicate the eighth amendment right." 710 F.2d at 1060-61 (footnote omitted).

We reject this contention of Calhoun.

E

Calhoun next contends that "[b]ecause an assessment of [Calhoun's] 'future dangerousness' was a statutory factor relied upon by the sentencing body below, the Maryland Capital Punishment Statute is unconstitutional in its application in this case." He says:

> "Article 27, Sections 413 (c) (1) (i) and (g) (7) permit the introduction of evidence of a defendant's unlikeliness of engaging 'in further criminal activity that would constitute a threat to society,' as a mitigating factor. These sections are unconstitutional as applied in this case under the Eighth and Fourteenth Amendment Rights, and Art. 25 of the Maryland Declaration of Rights."

It is Calhoun's contention that, under the Eighth Amendment and Article 25 of our Declaration of Rights the procedural limits applied in determining the type and degree of punishment to be imposed are greater in capital sentencing proceedings than in other sentencing proceedings. That is, they mandate a higher quality of evidence. In this case Calhoun contends that the evidence introduced at the sentencing hearing to demonstrate his propensity for future dangerousness was highly speculative, unreliable, and inconclusive, and that such evidence does not provide a legal basis for distinguishing those cases in which the death penalty should be imposed. From this stems his contention that the introduction of this evidence violated his constitutional rights. He cites various psychiatric studies that illustrate the speculation involved in labeling a person as having a propensity toward violence: most persons determined to be violent recidivists prove not to be involved in subsequent

acts or incidents of violence. He maintains that the evidence or testimony of the guard considered in viii, *supra*, not only failed to establish his future dangerousness, but also served as a nonstatutory aggravating circumstance that inflamed and prejudiced the jury.

The State, on the other hand, argues that nothing in the record of the sentencing proceeding indicates that the jury considered propensity toward violence as a factor in determining Calhoun's sentence. Nevertheless, it concedes that the evidence concerning Calhoun's behavior at the Montgomery County Detention Center was introduced for the purpose of illustrating that not even incarceration of Calhoun would prevent him from engaging in future criminal acts. The State further contends that expert psychiatric testimony is not required for a jury to be able to evaluate the significance of the guard's testimony and to determine that Calhoun was not entitled to a finding of an absence of propensity for future violence as a mitigating factor.

In several cases concerning the death penalty the Supreme Court has stated that the sentencing process must provide for determination and consideration of the particular facts at issue as well as the particular character traits and propensities of the defendant. *See, e.g., Zant v. Stephen* U.S. . 103 S. Ct. 2733, 2743-44, 77 L. Ed. 2d 235 (1983); *Eddings v. Oklahoma*, 455 U.S. 104, 112, 102 S. Ct. 869, 71 L. Ed. 2d 1 (1982); *Lockett v. Ohio*, 438 U.S. 586, 605, 98 S. Ct. 2954, 57 L. Ed. 2d 973 (1978); *Woodson*, 428 U.S. at 304; *Jurek*, 428 U.S. at 276. The Supreme Court apparently views such a consideration to be an essential feature of capital sentencing procedures which are in compliance with the Eighth and Fourteenth Amendments. For example, in the plurality opinion in *Woodson*, Justice Stewart noted that:

> "This Court has previously recognized that '[f]or the determination of sentences, justice generally requires consideration of more than the particular acts by which the crime was committed and that there be taken into account the circumstances of the

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> offense together with the character and propensities of the offender.' *Pennsylvania ex rel. Sullivan v. Ashe*, 302 U.S. 51, 55 (1937). Consideration of both the offender and the offense in order to arrive at a just and appropriate sentence has been viewed as a progressive and humanizing development. See *Williams v. New York*, 337 U.S., at 247-249; *Furman v. Georgia*, 408 U.S., at 402-403 (Burger, C.J., dissenting). While the prevailing practice of individualizing sentencing determinations . generally reflects simply enlightened policy rather than a constitutional imperative, we believe that in capital cases the fundamental respect for humanity underlying the Eighth Amendment, see *Trop v. Dulles*, 356 U.S., at 100 (plurality opinion), requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death." 428 U.S. at 304.

Although several of the Supreme Court cases which stated hat the particular offense and particular propensities of the lefendant must be reviewed at the sentencing hearing have tressed the necessity of considering factors in mitigation. .g. *Eddings*, 455 U.S. at 113-15, and *Lockett*, 438 U.S. at 05-06, other decisions have indicated that *all* relevant nformation, positive as well as negative, is admissible luring the sentencing proceeding. It is to be noted that both he Oklahoma and Ohio statutes at issue in *Eddings* and *Lockett* strictly limited the type of evidence admissible in nitigation, unlike the situation prevailing in Maryland. In *Gregg*, 428 U.S. 153, the plurality opinion noted that ecause information relevant to sentencing often is too prej- dicial or irrelevant to the question of guilt, a bifurcated rial procedure best insures that the jury will impose the leath sentence in a rational way. The plurality believed that a jury determination of the sentence was desirable in order o maintain a connection between contemporary community tandards and the penal system.

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Recently in *Barclay v. Florida*, U.S. , 103 S. Ct. 3418, 77 L. Ed. 2d 1134 (1983), the Court upheld the application by the Florida Supreme Court of the doctrine of harmless error to a capital sentencing proceeding in which the trial judge had relied on a nonstatutory aggravating circumstance.[2] The trial judge, in addition to finding four statutory aggravating circumstances, noted that Barclay's extensive prior criminal record itself constituted an aggravating circumstance. *Id.* at 3422. The Florida capital punishment statute's only reference to a prior criminal record appears under the mitigating circumstances: the *lack of* a prior criminal record is a mitigating circumstance. This is similar to the situation we are confronting here: the appellant's propensity for future dangerousness was introduced by the State in order to illustrate to the jury that Calhoun would act in a violent manner while incarcerated and thus that the sentence should not be life imprisonment. The only comparable reference in our capital punishment statute is to a mitigating circumstance as provided in § 413 (g) (7), that the defendant is unlikely to "engage in further criminal activity that would constitute a continuing threat to society." In *Barclay* the Florida court, although noting that the trial judge improperly relied on the defendant's prior criminal record in imposing the death sentence, affirmed the trial judge's sentence on the basis that this constituted harmless error given the presence of several statutory aggravating circumstances. 103 S. Ct. at 3428.

In affirming the decision of the Florida court, the plurality opinion of the Supreme Court first noted that the trial judge's consideration of Barclay's criminal record as an aggravating circumstance was improper as a matter of state law. The trial judge, however, did not consider constitutionally protected conduct nor was such evidence inadmissible under Florida law. "On the contrary, this evidence was properly introduced to prove that the mitigating

2. In Florida the sentencing jury only makes a recommendation as to whether the sentence should be death or life imprisonment. The final sentencing authority rests with the trial judge.

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circumstance of absence of a criminal record did not exist." 103 S. Ct. at 3427 (Rehnquist, J., wrote the plurality opinion, joined by the Chief Justice and Justices White and O'Connor). Further, the plurality cited *Proffitt*, 428 U.S. 242, stating that no constitutional violation existed in a procedure under which a defendant could receive the death penalty on the basis of a combination of statutory and nonstatutory aggravating circumstances. 103 S. Ct. at 3428. Finally, the plurality stated that the Florida Supreme Court record illustrated that the harmless error doctrine was not applied in an automatic or mechanical way in capital punishment cases. This fact, combined with the Florida court's practice of reviewing similar cases, mandated a finding of no constitutional violation. *Id.*

In Justice Stevens' concurring opinion in *Barclay*, joined by Justice Powell, he said:

> "The Florida rule that statutory aggravating factors must be exclusive affords greater protection than the federal Constitution requires. Although a death sentence may not rest *solely* on a nonstatutory aggravating factor, see *Zant v. Stephens*, *supra*, U.S., at , 103 S. Ct., at 2742-2743, the Constitution does not prohibit consideration at the sentencing phase of information not directly related to either statutory aggravating or statutory mitigating factors, as long as that information is relevant to the character of the defendant or the circumstances of the crime. *Zant*, *supra*, at , , 103 S. Ct., at 2743-2744, 2747-2749; *Gregg v. Georgia*, *supra*, 428 U.S., at 164, 196-197, 206, 96 S. Ct., at 2920-2921, 2936, 2940-2941; *Proffitt v. Florida*, *supra*, 428 U.S., at 242, 248, 256-257, n. 14, 96 S. Ct. at 2960, 2964-2965, 2968-2969, n. 14. As we recently wrote in *Zant*, 'What is important at the selection stage is an *individualized* determination on the basis of the character of the individual and the circumstances of the crime.' U.S., at , 103 S. Ct., at

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2743-2744." U.S. at . 103 S. Ct. at 3432-33 (emphasis in original).

Thus, both the plurality and concurring decisions in *Barclay* suggest that the introduction of the guard's testimony concerning Calhoun did not violate the Constitution because that evidence was relevant to an "individualized determination" of his character.

In addition to the previously cited cases dealing with the admissibility of evidence about the defendant's character in a capital sentencing proceeding, two Supreme Court cases have confronted directly the question of the propriety of testimony concerning a defendant's future dangerousness. First, in *Estelle v. Smith*, 451 U.S. 454, 101 S. Ct. 1866, 68 L. Ed. 2d 359 (1981),[3] the Court held that the prosecution's use of psychiatric testimony at a capital sentencing proceeding to establish the defendant's future dangerousness violated the defendant's Fifth and Sixth Amendment rights. The defendant had not consented to the psychiatric examination after being informed of both his right to remain silent and the fact that the evidence could be used against him. *Id.* at 467-68. Further, because this proved to be a critical stage of the proceeding, defendant's right to counsel attached. Despite this holding, the Court noted:

> "[U]nder the Texas capital sentencing procedure, the inquiry necessary for the jury's resolution of the future dangerousness issue is in no sense confined to the province of psychiatric experts. Indeed, some in the psychiatric community are of the view that clinical predictions as to whether a person would or would not commit violent acts in the future are 'fundamentally of very low reliability' and that psychiatrists possess no special qualifications for making such forecasts." 451 U.S. at 472.

3. It is important to note that one of the three questions the sentencing jury in Texas must answer affirmatively before imposing the death penalty is "'whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society.'" *Estelle v. Smith*, 451 U.S. 454, 458, 101 S. Ct. 1866, 68 L. Ed. 2d 359 (1981).

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Second, in *Jurek*, 428 U.S. 262, the Supreme Court rejected the petitioner's contention that it is impossible to predict future behavior:

> "Focusing on the second statutory question that Texas requires a jury to answer in considering whether to impose a death sentence, the petitioner argues that it is impossible to predict future behavior and that the question is so vague as to be meaningless. It is, of course, not easy to predict future behavior. The fact that such a determination is difficult, however, does not mean that it cannot be made. Indeed, prediction of future criminal conduct is an essential element in many of the decisions rendered throughout our criminal justice system. The decision whether to admit a defendant to bail, for instance, must often turn on a judge's prediction of the defendant's future conduct. And any sentencing authority must predict a convicted person's probable future conduct when it engages in the process of determining what punishment to impose. For those sentenced to prison, these same predictions must be made by parole authorities." 428 U.S. at 274-75 (footnote omitted).

Although this language must be viewed in the context of the Texas capital punishment statute, it negates Calhoun's contention that evidence concerning future dangerousness is so speculative and unreliable as to result in a denial of due process.

Accordingly, we reject this contention.

F

Calhoun contends, "Article 27, sec. 413 (d) (10), which permits imposition of the death penalty upon proof that the murder was committed during the commission or attempt to commit a specified felony, is an unconstitutional aggravating factor."

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Calhoun makes two points relative to this issue, (1) that § 413 (d) (10) produces an overbroad aggravating circumstance and results in a mandatory application of the death penalty, and (2) that the death penalty for felony murder is excessive in that the punishment is disproportionate to the crime committed and there is no deterrent or retributive value in the punishment for felony murder.

The State in response points out that the aggravating factor is limited in application by its own terms to murder in the commission of "robbery, arson, or rape or sexual offense in the first degree" while the felony murder statute, Article 27, § 410, pertains to "any rape in any degree, sexual offense in the first or second degree, sodomy, mayhem, robbery, burglary, kidnapping as defined in §§ 337 and 338 of [Article 27], storehouse breaking as defined in §§ 32 and 33 of [Article 27] or daytime housebreaking as defined in § 30 (b) of [Article 27], or in the escape or attempt to escape from [certain penal institutions]." Section 413 (d) (10) is also limited by other provisions. Art. 27, § 413 (e) (1) requires that the defendant be a principal in the first degree, thus exempting any accomplices to the felony who did not actually commit the murder. The aggravating circumstances are further limited by the mitigating circumstances of each case that are weighed against these aggravating circumstances during the sentencing proceedings. Thus, read as a whole the statute meets the *Gregg* standards and imposes the death penalty only in an "extreme" case. *Gregg*, 428 U.S. at 182.

The Supreme Court has considered cases challenging the scope of aggravating circumstances in death penalty cases. In *Godfrey v. Georgia*, 446 U.S. 420, the plurality opinion was written by Justice Stewart. The opinion referred to *Gregg*, 428 U.S. 153, and *Furman*, 408 U.S. 238. It states, "A capital sentencing scheme must, in short, provide a '"meaningful basis for distinguishing the few cases in which [the penalty] is imposed from the many cases in which it is not."'" 446 U.S. at 427.

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In *Godfrey* the petitioner was found guilty of the murder of his wife and mother-in-law. The only aggravating circumstance which applied to the facts stated, "The offense of murder . . . was outrageously or wantonly vile, horrible, or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim." Ga. Code Ann. § 17-10-30 (b) (7) (1982). In *Gregg* the Court had considered the same provision and found it constitutional based on the limiting interpretation of the provision by the Supreme Court of Georgia. In *Godfrey* the Supreme Court found Georgia went too far in applying the provision and as a result the aggravating circumstance was unconstitutional.

> "In the case before us, the Georgia Supreme Court has affirmed a sentence of death based upon no more than a finding that the offense was 'outrageously or wantonly vile, horrible and inhuman.' There is nothing in these few words, standing alone, that implies any inherent restraint on the arbitrary and capricious infliction of the death sentence. A person of ordinary sensibility could fairly characterize almost every murder as 'outrageously or wantonly vile, horrible and inhuman.' " 446 U.S. at 428-29 (footnote omitted).

In a footnote, however, Justice Stewart recognized for the plurality that the other Georgia aggravating factors were "more specific or objectively measurable than § (b) (7) . . . ." 446 U.S. at 423 n. 2. One of the nine circumstances listed is similar to the aggravating factor at issue in the present case. Ga. Code Ann. § 17-10-30 (b) (2) (1982), states as an aggravating factor, "The offense of murder ... was committed while the offender was engaged in the commission of another capital felony, [(rape, armed robbery, kidnapping)] or aggravated battery, or the offense of murder was committed while the offender was engaged in the commission of burglary or arson in the first degree." Under the Maryland statute felony murder as an aggravating circumstance is sufficiently limited by its own terms and other provisions of the statute, thus meeting the constitutional

requirements set down by the Supreme Court in *Godfrey*. In this instance the jury found two other aggravating circumstances. However, even if this particular aggravating circumstance had been the only one found it would not result in an "arbitrary and capricious" infliction of the death sentence, as prohibited by the Supreme Court in *Furman*, 408 U.S. 238. *See also Gregg v. Georgia*, 428 U.S. at 188.

Although § 413 (d) (10) is the most common aggravating circumstance applied, this does not detract from its validity when the data relative to capital cases is placed in perspective. While the majority of capital cases where the death penalty was imposed by the sentencing authority contained (d) (10) as at least one of the aggravating circumstances (75%), there is no evidence that the majority of all murders in the State are felony murders of the type listed in § 413 (d) (10). Additionally, not all of those charged with felony murder are principals in the first degree as required under § 413 (e) (1). There appear to be sufficient limits on the application of § 413 (d) (10) to meet the criteria of the Supreme Court. Absent other evidence to the contrary, Calhoun's claim of overbreadth is unfounded.

As to Calhoun's second claim that the death penalty is excessive in felony murder cases, guidelines have been established by the Supreme Court for consideration of this issue. In *Coker*, 433 U.S. 584, the Court considered several factors in deciding whether the death penalty was an excessive punishment for the crime of rape:

> "Under *Gregg*, a punishment is 'excessive' and unconstitutional if it (1) makes no measurable contribution to acceptable goals of punishment and hence is nothing more than the purposeless and needless imposition of pain and suffering; or (2) is grossly out of proportion to the severity of the crime. A punishment might fail the test on either ground." 433 U.S. at 592.

Primarily, the Court considered objective factors in reaching its decision, legislative judgments, and sentencing decisions

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made by juries. It stressed the importance of society's view of what constitutes "cruel and unusual" punishment. That the death penalty was not a disproportionate punishment for the crime of murder was recognized by Justice White in the plurality opinion, in which he compared the crime of murder to the crime of rape:

> "Rape is without doubt deserving of serious punishment; but in terms of moral depravity and of the injury to the person and to the public, it does not compare with murder, which does involve the unjustified taking of human life. Although it may be accompanied by another crime, rape by definition does not include the death of or even the serious injury to another person. The murderer kills; the rapist, if no more than that, does not. Life is over for the victim of the murderer; for the rape victim, life may not be nearly so happy as it was, but it is not over and normally is not beyond repair." 433 U.S. at 598 (footnote omitted).

More recently the Supreme Court considered whether the death penalty is valid punishment for an accomplice sentenced to death for felony murder where the accused "neither took life, attempted to take life, nor intended to take life." *Enmund v. Florida*, 458 U.S. 782, 787, 102 S. Ct. 3368, 73 L. Ed. 2d 1140 (1982). The Court found the punishment to be excessive in that case. Justice White noted for the Court that "one state flatly prohibits capital punishment in cases where the defendant did not actually commit murder," refering to our requirement that it is only a principal in the first degree who is subject to the death penalty. Although the holding of the Court is not explicit, it appears that the Court in *Enmund* was not declaring the death penalty excessive for an accomplice in felony murder but only as applied to the circumstances of that case. The Court said:

> "Enmund did not kill or intend to kill and thus his culpability is plainly different from that of the robbers who killed; yet the state treated them alike

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> and attributed to Enmund the culpability of those who killed the Kerseys." 458 U.S. at 798.

In *Enmund* the Court considered legislative decisions as evidenced by death penalty statutes then operating as well as sentencing decisions made by juries and found little support for the death penalty in accomplice felony murder cases. In this regard it should be noted that, according to the statistics in the Supreme Court opinion, Maryland is the only state of approximately thirty-two states with death penalty statutes which flatly prohibits capital punishment where the defendant is not a principal in the first degree. The Court observed:

> "The question before us is not the disproportionality of death as a penalty for murder, but rather the validity of capital punishment for Enmund's own conduct. The focus must be on *his* culpability, not on that of those who committed the robbery and shot the victims, for we insist on 'individualized consideration as a constitutional requirement in imposing the death sentence.' *Lockett v. Ohio*, 438 U.S. 586, 605 (1978) (footnote omitted), which means that we must focus on 'relevant facets of the character and record of the individual offender.' *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976)." 458 U.S. at 798 (emphasis in original).

Although under the facts in *Enmund* the Court denied the death penalty's value as a punishment, it did not deny the deterrent and retributive value under felony murder as applicable in Maryland:

> "We are quite unconvinced, however, that the threat that the death penalty will be imposed for murder will measurably deter one who does not kill and has no intention or purpose that life will be taken. Instead, it seems likely that 'capital punishment can serve as a deterrent only when murder is the result of premeditation and deliberation.'

> *Fisher v. United States*, 328 U.S. 463, 484 (1946) (Frankfurter, J., dissenting), for if a person does not intend that life be taken or contemplate that lethal force will be employed by others, the possibility that the death penalty will be imposed for vicarious felony murder will not 'enter into the cold calculus that precedes the decision to act.' *Gregg v. Georgia*, *supra*, at 186." 458 U.S. at 798-99.

In *Enmund*, on the subject of retribution, the Court further said:

> "As for retribution as a justification for executing Enmund, we think this very much depends on the degree of Enmund's culpability — what Enmund's intentions, expectations, and actions were. American criminal law has long considered a defendant's intention — and therefore his moral guilt — to be critical to 'the degree of [his] criminal culpability.' *Mullaney v. Wilbur*, 421 U.S. 684, 698 (1975), and the Court has found criminal penalties to be unconstitutionally excessive in the absence of intentional wrongdoing." 458 U.S. at 800.

Although Calhoun has argued his lack of intent to commit murder in the course of a felony, the operation here was planned. This was set forth in the testimony of the accomplice relative to the postmidnight meeting after they were initially scared off. The felons wore masks and gloves. Calhoun and his associate went armed. The guns must have been intended for use if circumstances required. Those instructing in the use of firearms teach that one should not point a gun at an individual unless one intends to kill that individual. Although the Supreme Court in *Enmund* found no value in the punishment for one who was neither present or armed at the time of murder, it did not deny the value of the penalty as a punishment imposed on the "trigger man." We find § 413 (d) (10) to be a constitutional aggravating factor.

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G

Calhoun claims, "Article 27, sec. 413 (c), renders the death penalty in Maryland unconstitutional." This contention apparently is based on the belief that the section is constitutionally infirm because of its broad provisions as to evidence the sentencing authority is to consider in reaching its decision to impose either the death penalty or life imprisonment. Section 413 (c) (1) states in its entirety:

> "(c) *Evidence; argument; instructions.* — (1) The following type of evidence is admissible in this proceeding:
>
> "(i) Evidence relating to any mitigating circumstance listed in subsection (g);
>
> "(ii) Evidence relating to any aggravating circumstance listed in subsection (d) of which the State had notified the defendant pursuant to § 412(b);
>
> "(iii) Evidence of any prior criminal convictions, pleas of guilty or nolo contendere, or the absence of such prior convictions or pleas, to the same extent admissible in other sentencing procedures;
>
> "(iv) Any presentence investigation report. However, any recommendation as to sentence contained in the report is not admissible; and
>
> "(v) Any other evidence that the court deems of probative value and relevant to sentence, provided the defendant is accorded a fair opportunity to rebut any statements."

Calhoun contends that the statute fails to satisfy the constitutional mandate to limit jury discretion: it fails not only to provide clear and objective standards that provide specific guidance for the sentencing authority, but also to provide a basis for the rational review of the sentence. The fact that the jury is given the same boundless discretion in capital punishment cases — to consider reliable, nonjudicial evidence of conduct — as the trial judge is given in other

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criminal cases violates the Eighth and Fourteenth Amendments.

The State contends that the guidance constitutionally required to be given to the jury is manifested in the Maryland statute. Thus, the jury may consider some evidence not properly admissible at the trial stage when determining the sentence to be imposed. It notes that the admissibility of evidence relating to a defendant's conduct cannot result in the creation of new, nonstatutory aggravating circumstances because such evidence is admissible only *after* statutory aggravating circumstances have been proven.

In *Johnson v. State*, 292 Md. 405, Judge Digges said for the Court:

> "In our view, part (v) [of § 413(c)] in unambiguous terms authorizes the trial court to admit into evidence before the sentencing jury identical information concerning a defendant's criminal conduct as would normally be considered by the judge if he were imposing sentence in a non-death penalty case." 292 Md. at 442-43.

We further noted that the sentencing authority in a capital punishment case ought to be provided all relevant information. *Id.* at 443. Calhoun contends that this grant of discretion to the jury is too broad and thus violates his Eighth and Fourteenth Amendment rights. He overlooks, however, both the context of the Maryland statute in which this discretion is to be exercised and various Supreme Court opinions that approve jury sentencing in death penalty cases.

The Supreme Court has stated several times that the jury's authority to sentence a person convicted of first degree murder to death is constitutional as long as procedural safeguards exist that "guide" and "channel" the jury's decision. *See Barclay*, U.S. , 103 S. Ct. 3418, 3424; *Zant*, U.S. , 103 S. Ct. 2733, 2742-43; *Proffitt*, 428 U.S. 242, 258; *Jurek*, 428 U.S. 262, 276; *Gregg*, 428 U.S. 153, 192; and *Furman*, 408 U.S. 238, 400-01 (Burger, C.J., dissenting).

In *Furman* Chief Justice Burger noted that the penalty of death itself was not cruel; rather, the procedures for imposing sentence violated the Eighth Amendment. 408 U.S. 238, 397-98 (Burger, C.J., dissenting). The Chief Justice stated that legislatures must provide sentencing standards and narrow definitions of crimes for which the death penalty may be imposed in order to insure its imposition in a rational, noncapricious, and nonarbitrary manner. *Id.* at 400-01. This view was noted by the plurality opinion in *Gregg*, 428 U.S. 153. "*Furman* mandates that where discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action." *Id.* at 189. The *Gregg* plurality recognized the problem that juries, as inexperienced sentencers, could misapply information heard in a sentencing proceeding:

> "[T]he provision of relevant information under fair procedural rules is not alone sufficient to guarantee that the information will be properly used in the imposition of punishment, especially if sentencing is performed by a jury. Since the members of a jury will have had little, if any, previous experience in sentencing, they are unlikely to be skilled in dealing with the information they are given. . . . To the extent that this problem is inherent in jury sentencing, it may not be totally correctible. It seems clear, however, that the problem will be alleviated if the jury is given guidance regarding the factors about the crime and the defendant that the State, representing organized society, deems particularly relevant to the sentencing decision." 428 U.S. at 192 (citations omitted).

The plurality then noted that the Georgia statute provided the sentencing authority sufficient guidelines by means of its listing the aggravating and mitigating factors to be considered combined with its requiring the jury to specify the factors it used in reaching its decision. *Id.* at 197-98. The

Court there stated that the combination of a carefully drafted statute and a bifurcated proceeding at which the sentencing authority was "apprised of the information relevant to the imposition of sentence and provided with standards to guide its use of the information" insures rational imposition of the death penalty. *Id.* at 195. The plurality opinion further noted. "So long as the evidence introduced and the arguments made at the presentence hearing do not prejudice a defendant, it is preferable not to impose restrictions. We think it desirable for the jury to have as much information before it as possible when it makes the sentencing decision." *Id.* at 203-04, cited with approval in *Zant*, U.S. at , 103 S. Ct. at 2748.

Concerning the statute at issue in *Proffitt*, 428 U.S. 242, the plurality opinion noted that the jury was provided with sufficient guidance at the sentencing phase so as to ensure that capital punishment is imposed rationally and nonarbitrarily:

> "While the various factors to be considered by the sentencing authorities do not have numerical weights assigned to them, the requirements of *Furman* are satisfied when the sentencing authority's discretion is guided and channeled by requiring examination of specific factors that argue in favor of or against imposition of the death penalty, thus eliminating total arbitrariness and capriciousness in its imposition.
>
> "The directions given to judge and jury by the Florida statute are sufficiently clear and precise to enable the various aggravating circumstances to be weighed against the mitigating ones. As a result, the trial court's sentencing discretion is guided and channeled by a system that focuses on the circumstances of each individual homicide and individual defendant in deciding whether the death penalty is to be imposed." 428 U.S. at 258.

Moreover, in *Barclay*, U.S. , 103 S. Ct. 3418, the plurality opinion stated that a sentencing authority's

bringing of its own experience to bear on a sentencing determination did not constitute an abuse of discretion and thus did not violate the petitioner's rights under the Eighth and Fourteenth Amendments. In rejecting Barclay's argument that the trial judge improperly compared Barclay's actions to those of the Nazis in World War II, Justice Rehnquist said for the plurality:

> "Any sentencing decision calls for the exercise of judgment. It is neither possible nor desirable for a person to whom the state entrusts an important judgment to decide in a vacuum, as if he had no experiences. The thrust of our decisions on capital punishment has been 'that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action.' *Zant v. Stephens*, U.S. , , 103 S. Ct. 2733, 2741, 75 L. Ed. 2d (1983), quoting *Gregg v. Georgia*, 428 U.S. 153, 189, 96 S. Ct. 2909, 2932, 49 L. Ed. 2d 859 (1976) (opinion of Stewart, POWELL, and STEVENS, JJ.). . . .
>
> "It is entirely fitting for the moral, factual, and legal judgment of judges and juries to play a meaningful role in sentencing. We expect that sentencers will exercise their discretion in their own way and to the best of their ability. As long as that discretion is guided in a constitutionally adequate way, see *Proffitt v. Florida*, 428 U.S. 242, 96 S. Ct. 2960, 49 L. Ed. 2d 913 (1976), and as long as the decision is not so wholly arbitrary as to offend the Constitution, the Eighth Amendment cannot and should not demand more." U.S. at , 103 S. Ct. at 3424.

Accord id. U.S. at , 103 S. Ct. at 3435 (Stevens, J., concurring, joined by Powell, J.).

The above cited Supreme Court cases state that a sentencing jury's exercise of discretion is permissible as long as that exercise is conducted within the confines and in com-

pliance with the standards of a "carefully drafted" capital sentencing statute. Maryland's statute, as previously analyzed in *Johnson*, 292 Md. 405, and *Tichnell I*, 287 Md. 695, falls within the Supreme Court's prescription for a statute that provides sufficient guidance and opportunity for channeled discretion to the sentencing authority. First, the sentencing authority must determine whether any enumerated statutory aggravating circumstance exists beyond a reasonable doubt. Art. 27, § 413 (d). Second, if the sentencing authority finds that one or more aggravating circumstances exist, it must consider whether any mitigating circumstances exist by a preponderance of the evidence; as illustrated in this case, the sentencing authority is not restricted to a consideration of the specifically enumerated statutory mitigating factors. Section 413 (g). Third, the sentencing authority must determine whether the mitigating circumstances outweigh the aggravating circumstances by a preponderance of the evidence; only if the mitigating circumstances do not outweigh the aggravating circumstances under the preponderance standard is the death sentence imposed. Section 413 (h). Fourth, the determination of the sentencing authority must be in writing and must be unanimous. Section 413 (i). Fifth, the sentencing authority must specify in writing the factors considered in rendering its decision. Section 413 (j). All of these provisions together provide the guidance and means of channeling the jury's discretion that the Supreme Court requires. Hence, we reject this contention of Calhoun.

H

Calhoun next contends that "Article 27, secs. 413 and 414, unconstitutionally restrict the discretion of the finder of fact in determining whether the death penalty should be imposed."

Calhoun first contends that the Maryland death penalty statute is unconstitutional because it mandates the sentence of death in any case where one or more aggravating circumstances are found but no mitigating circumstance is found.

We hasten to point out that a mitigating circumstance was found in this instance. Thus, that portion of his contention is not before us. He claims the sentencing authority should be entitled to conclude that even if a case is within the literal terms of one or more statutory aggravating circumstances, the death penalty is unwarranted. He further contends that the capital punishment statute is unconstitutional because different factfinders may perceive particular aggravating and mitigating circumstances differently; thus, the determination of whether the death penalty should be imposed rests on "semantic distinctions."

The State argues that the Maryland statute is constitutional because it permits a sentencing authority to articulate any mitigating factor — statutory or nonstatutory — deemed relevant and then to consider whether it outweighs the statutory aggravating factor or factors. Therefore, the statute does not mandate the imposition of the death penalty in any given type of case.

In *Tichnell I*, 287 Md. 695, we noted that because the Maryland statute allows for consideration of a broad range of mitigating factors, it satisfied the standards established by the Supreme Court in *Woodson*, 428 U.S. 280, and *Roberts (Stanislaus) v. Louisiana*, 428 U.S. 325. *See Tichnell I*, 287 Md. at 728. In *Woodson* and *Roberts (Stanislaus)*, as well as in *Roberts (Harry) v. Louisiana*, 431 U.S. 633, 97 S. Ct. 1993, 52 L. Ed. 2d 637 (1977), the Supreme Court struck down statutes that required the mandatory imposition of the death penalty for first degree murder. The Court's primary criticism of the North Carolina and Louisiana statutes was that they precluded consideration of the particular traits of the individual defendant and the particular circumstances of the crime for which he was convicted. *See Roberts (Harry)*, 431 U.S. at 637; *Roberts (Stanislaus)*, 428 U.S. at 335-36; *Woodson*, 428 U.S. at 304-05.

Our statute provides for an individualized determination of the defendant and the crime. This fact alone would appear to insure that the death sentence is not imposed in a mandatory manner. Further, as Chief Judge Murphy noted for the Court in *Tichnell III*, 297 Md. 432, in the forty-eight cases

F. 7.1

where the State sought the death penalty it was imposed twenty times, thus negating any mandatory result. Moreover, the sentencing authority may articulate *any factor* it finds in mitigation. *See* Code (1957, 1982 Repl. Vol.) Art. 27, § 413 (g) (8), which states, "Any other facts which the jury or the court specifically sets forth in writing that it finds as mitigating circumstances in the case." Indeed, this case is a splendid example of the willingness of a jury to consider relevant information that may be weighed against a proven statutory aggravating circumstance or circumstances. Here the jury determined that "a substantial mitigating factor is the defendant's background, which has been such that he has never been integrated into society. Therefore, he has been and is unable to conform with its norms and moral values."

Finally, of the forty-eight cases in which the State sought the death penalty, only one involved the situation about which Calhoun here warns: where one or more aggravating circumstances is found and no mitigating circumstance is established.

This contention of Calhoun also must fall.

I

Calhoun claims, "The statute unconstitutionally places the burden of proof to show mitigation on the accused."

Calhoun argues that the statute violates his due process rights by placing an unconstitutional burden on him to prove by a preponderance of the evidence the mitigating circumstances and that they outweigh any aggravating factor. He contends that the burden of proof must be on the State to prove beyond a reasonable doubt the absence of any mitigating circumstance raised and that the aggravating circumstances outweigh the mitigating circumstances. He asserts that the sentencing proceeding is as important as the trial, particularly when the punishment is death, and, therefore, due process protections require that the risk of error be minimized by placing the burden on the State.

F. 75

Judge Digges said for the Court in *Johnson*, 292 Md. at 436, that this argument was "thoroughly considered and rejected, however, in our recent decision of *Tichnell v. State*, 287 Md. 695, 720-34, 415 A.2d 830, 843-50 (1980), and we deem the matter to be settled." We need say no more.

x Sufficiency of the evidence

Calhoun contends, correctly, that Maryland Code (1957, 1982 Repl. Vol.) Art. 27, § 413 (e)(1) provides that one may not be punished by death absent proof that he was a principal in the first degree to first degree murder. He also says, correctly, that under *State v. Ward*, 284 Md. 189, 197, 396 A.2d 1041 (1978), a first degree principal is one who actually commits a crime. Then he cites *Bedford v. State*, 293 Md. 172, 443 A.2d 78 (1982), and asserts that "in order to justify the sentence of death, the State was bound to adduce evidence sufficient to permit a rational trier of facts to find beyond a reasonable doubt that [Calhoun] fired the shots which killed Officer Metz." We pointed out in *Bedford*:

> "Applying [the] standard under *Jackson [v. Virginia]*, 443 U.S. 307, [99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979)], Chief Judge Murphy said for the Court in *State v. Rusk*, 289 Md. 230, 240, 424 A.2d 720 (1981), 'The applicable standard is "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." 443 U.S. at 319 (emphasis in original). *Accord, Tichnell v. State*, 287 Md. 695, 717, 415 A.2d 830 (1980).'" 293 Md. at 175-76 (footnote omitted).[4]

4. We pointed out in *Bedford* for the benefit of the generation of attorneys admitted to the bar in the last thirty years that it was long customary for counsel to read to the jury from various textbooks. A favorite of defense counsel was L. Hochheimer, *Criminal Law* (2d ed. 1904). Their favorite text was § 157 of that work relative to the burden of proof which we said we regarded "as being basically in accord with that enunciated by the Supreme Court in *Jackson v. Virginia*, 443 U.S. 307, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979)." 293 Md. at 176 n. 1.

? -F. 76

On the burden of proof *see also Veney v. State*, 251 Md. 182, 201, 246 A.2d 568 (1968), *cert. denied*, 394 U.S. 948 (1969), a capital case, where we referred to *Pressley v. State*, 244 Md. 664, 667, 224 A.2d 866 (1966), as to the sufficiency of evidence, and *Ramsey v. State*, 239 Md. 561, 566-67, 212 A.2d 319 (1965), as to our function as an appellate court as to sufficiency of the evidence.

We have already recited the evidence. Cummins described how Metz was pulled into the doorway. When less than a minute later Cummins was dragged into the office he observed Metz lying on the floor and bleeding from the head. Calhoun was alone in the room with Cummins and Metz' body at that time. Calhoun's contention relative to insufficiency is the existence of a door in the office that led to the outside. He claims that a third person might have fired the shots and then escaped from the room in question by that door. Yet Calhoun and the man who shot Cummins saw fit to escape through the roof. A rational trier of fact certainly could find that Calhoun was the only one present who could have killed Metz and that, if the robbers were aware of a quick method of escape through the door, Calhoun and his cohort would not have seen fit to go through a hole in the roof.

We hold that there was sufficient evidence to conclude that Calhoun was a principal in the first degree.

xi Proportionality review

Calhoun is now thirty years of age, being a few days short of twenty-eight years of age at the time of the incident in question. The jury found as aggravating factors: (1) the victim was a law enforcement officer who was murdered in the performance of his duties; (2) the defendant committed the murder in furtherance of an escape from or an attempt to escape from or evade the lawful custody, arrest or detention of or by an officer or guard of a correctional institution or by a law enforcement officer, and (3) the defendant committed the murder while committing or attempting to commit robbery. The only mitigating circumstance was set

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forth under "8." other mitigating circumstances. The jury stated:

> "This jury feels that a substantial mitigating factor is the defendant's background, which has been such that he has never been integrated into society. Therefore, he has been and is unable to conform with its norms and moral values."

The jury's sentence was death. Prior to this incident Calhoun had been convicted of armed robbery four times, in 1971, 1972, 1978, and 1979. His first conviction was when he was eighteen years of age.

In *Tichnell III*, 297 Md. 432, we have already set forth the "relevant universe" to be considered by us in our proportionality review. In the process of our review in this case we have considered each of the reports submitted by trial judges under Rule 772A.[5] We have selected six which we deem to be "similar" within the contemplation of Code (1957, 1982 Repl. Vol.) Art. 27, § 414 (e) (4):

> 1 — *Harlow Brian Sails:* Sails robbed a jewelry store in a shopping mall. Upon entering the store Sails and his cohorts placed masks over their faces and pulled out handguns. Sails was armed with a 9 mm. semi-automatic pistol. He and one of his associates were wearing bullet-proof vests. He and his co-defendants were apprehended by an off-duty policeman as they were leaving the mall. The officer and one co-defendant exchanged shots. Sails fired several shots at the officer. After the officer was wounded and on the floor, Sails went closer to him and fired two or more shots into him. Following this incident, as Sails was leaving the mall, a man accosted and tripped Sails, who then shot the man, inflicting wounds in both of the man's legs.
>
> Sails was convicted of first degree murder, two counts of robbery with a deadly weapon, and three counts of use

5. The appellant relied upon no additional cases in his brief.

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of a handgun. Three aggravating circumstances were found by the jury: (1) the victim was a law enforcement officer who was murdered while in the performance of his duties; (2) the defendant committed the murder in furtherance of an escape from or an attempt to escape from or evade lawful custody, arrest or detention of or by an officer or guard of a correctional institution or by a law enforcement officer; and (3) the defendant committed the murder while committing or attempting to commit robbery, arson or rape or sexual offense in the first degree. Mitigating circumstances found by the jury were: (1) the defendant had not previously been found guilty of a crime of violence, etc.; (2) the murder was committed while the capacity of the defendant to conform his conduct to the requirements of law were substantially impaired as the result of mental incapacity, mental disorder, emotional disturbance or intoxication; (3) it was unlikely that the defendant would engage in further criminal conduct that would constitute a continuing threat to society; and (4) under "8" or other mitigating circumstances:

"A. Harlow Brian Sails had not been incarcerated prior to his arrest following the events at Iverson Mall on 2/8/82.

"B. The defendant's criminal activity has not been characterized by gratuitous and sadistic physical violence against persons.

"C. The defendant is not a sadistic executioner style killer.

"D. The defendant's background and upbringing, which was unstable, marked by emotional trauma, neglect and inattention, and which lacked adequate guidance and supervision contributed to his criminal conduct."

The jury determined that the mitigating circumstances outweighed the aggravating circumstances and returned a sentence of life imprisonment.

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2 — *Jackie Hughes:* While a manager of a restaurant was walking to a nearby bank to deposit weekend receipts Hughes approached him from behind, grabbed him, spun him around, and shot him in the stomach. After a brief struggle Hughes wrested away the deposit. The victim, who was licensed to carry a handgun, fired several shots at Hughes at close range. A jury found Hughes guilty of first degree murder on the basis of the fact that it was a deliberate, willful and premeditated murder as well as a felony murder.

The jury found as an aggravating factor that the murder was committed while committing or attempting to commit a robbery. As a mitigating factor it found that Hughes had not previously been convicted of a crime of violence, etc. It also checked item "8," that other mitigating circumstances existed, but listed none. The jury returned a sentence of life imprisonment.

3 — *Richard Danny Tichnell:* The facts of this case have been detailed in *Tichnell I*, 287 Md. 695, and *Tichnell III*, 297 Md. 432. The victim, a police officer, was shot several times when he responded to a burglar alarm at a store in Garrett County. The facts at trial indicated that the victim was shot from behind, giving rise to an inference that Tichnell had ambushed the victim when the officer had apprehended Tichnell's co-defendant. The jury found two aggravating circumstances: (1) that the victim was a law enforcement officer who was murdered while in the performance of his duties, and (2) that Tichnell committed the murder in furtherance of an escape from or an attempt to escape from or evade the lawful custody, arrest or detention of or by an officer or guard of a correctional institution or by a law enforcement officer. The only mitigating circumstance found by the jury was that Tichnell had not previously been convicted of a crime of violence. The death sentence was imposed.

4 — *Brian Keith Quickley:* Quickley and two others entered a furniture store in Harford County. An accom-

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plice lured the victim to an area of the store isolated from the cash register. Quickley there shot the victim once between the eyes and again, as he was falling, in the back of the neck. The three individuals then left the store, taking television sets with them.

The jury found one aggravating circumstance, that the defendant committed the murder while committing or attempting to commit robbery. It found two mitigating circumstances. The first was the youthful age of the defendant at the time of the crime. The second, under "8" or "[o]ther mitigating circumstances," was:

> "The defendant is at the borderline range of intelligence with severe intellectual limitations both at the verbal and performance measured levels. His overall Intelligence Quotient was scored at 71. He is the product of an impoverished, social and educational environment. His academic progress has been limited. He has been in and out of Special Education and last attended the ninth grade. Extensive materials (tests, reports, etc.) from Juvenile Services, Harford County Public School System, the Maryland Children's Center and various social service groups have been filed in these proceedings as exhibits that demonstrate these inabilities."

The jury sentenced him to life imprisonment.

5 — *Eugene Sherman Colvin*, now pending before this Court: Colvin broke into a house. In the course of the crime he encountered the victim who was visiting in the home of her daughter. The victim was stabbed twenty-eight times about the throat. The weapon used was an eight-inch serrated knife taken from the kitchen of the home. About $10,000 in jewelry was removed from the residence. The victim's money was taken. Colvin was found guilty of premeditated murder, felony murder, robbery with a deadly weapon, and housebreaking.

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As an aggravating circumstance the jury found that the murder was committed while committing or attempting to commit robbery, arson, or rape or sexual offense in the first degree. No mitigating circumstances were found. Colvin's prior criminal record is similar to that of Calhoun in that he had been convicted several times of burglary, assault, and larceny. The jury imposed the death sentence.

6 — *Curtis Wayne Monroe:* Calhoun's cohort in the case at bar. The report of the trial judge, relative to the facts, states:

> "The police officer was pulled into a room, subdued, and shot in the head by Calhoun. At the same time, Monroe began firing a handgun, wounding the assistant manager, Douglas Cummins, and firing two shots into the alarm technician, David Myers, resulting in the death of Mr. Myers."

Monroe waived a jury and elected to have the sentencing procedure before the trial judge. As an aggravating circumstance it was found beyond a reasonable doubt that Monroe "committed the murder while committing or attempting to commit robbery, arson or rape or sexual offense in the first degree." The trial judge noted two mitigating circumstances. First, he found that it was unlikely the defendant would engage in further criminal activity that would constitute a continuing threat to society. Second, under "[o]ther mitigating circumstances," he found:

> "Defendant has been employed, has a wife and two children.
>
> "The actions of the defendant causing the murder, along with his background when compared to the other first degree murder cases occurring since the enactment of Article 29, Section 413, in which the death penalty has not been imposed.
>
> "Effort by the defendant since his incarceration to further his education."

Life imprisonment was imposed. In his report to us the trial judge said:

> "The primary consideration in not imposing the death penalty was the Court's own proportionality test in comparison to other offenses in the Circuit Court for Montgomery County in which the death penalty had been sought but not imposed, and a comparison between Curtis Wayne Monroe and the co-defendant James Arthur Calhoun, who received the death penalty, indicated that the imposition of the death penalty was not appropriate in this case. Other mitigating circumstances did not outweigh the aggravating factor and the nature of the offense."

Pursuant to the mandate of Code (1957, 1982 Cum. Supp.) Art. 27, § 414 (e) as to factors to be considered by us relative to the sentence, we find in this case that the sentence of death was not imposed under the influence of passion, prejudice, or any other arbitrary factor; the evidence supports the jury's finding of a statutory aggravating circumstance under § 413 (d); the evidence supports the jury's finding that the aggravating circumstances are not outweighed by mitigating circumstances; and the sentence of death is not excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant. We point out that in three of the cases we have reviewed in which the defendant was sentenced to life imprisonment — Sails, Hughes, and Quickley — the sentencing jury found several mitigating factors; in Monroe, the sentencing judge found two mitigating factors. In this case Calhoun's environment was the sole mitigating circumstance. In none of the reviewed cases where the death penalty was imposed did the sentencing authority find that three aggravating circumstances were proven beyond a reasonable doubt as in this case. It thus follows that the death sentence must be affirmed.

JUDGMENT AFFIRMED.

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Davidson, J., dissenting:

I adhere to my view that under Maryland Code (1957, 1982 Repl. Vol.), Art. 27, § 414 (e) the inventory of cases utilized for proportionality review must include not only those death-eligible cases in which the prosecutor has sought the death penalty, whether it was imposed or not, but all those death-eligible cases in which the prosecutor did not seek the death penalty. *Tichnell v. State*, 297 Md. 432, 485 A.2d , (1983) (Davidson J., dissenting) (*Tichnell III*). For the reasons expressed in Part I of my dissenting opinion in *Tichnell III*, I would vacate the death sentence in this case. Accordingly, I respectfully dissent.

In addition, however, I feel impelled to note that the majority's decision is indefensible for other reasons as well — for today the majority permits a defendant, deprived of a fair and impartial sentencing proceeding, to be executed because his lawyer allegedly made a mistake. In my view, the admission of testimony concerning an incident that occurred at the Montgomery County Detention Center in August 1981 involving the defendant and a correctional officer constituted prejudicial error. For the additional reasons expressed below, I would vacate the death sentence in this case.

The majority here refuses to consider whether the trial court committed prejudicial error when, during the sentencing proceeding, it admitted into evidence testimony concerning the Montgomery County Detention Center incident in August 1981. The majority finds that the defendant's specific objection to this testimony was that it "bore no relationship to the specified aggravating circumstances." Additionally, the majority finds that the specific objection "was narrowed by defense counsel to whether the incident at the detention center was relevant to 'a mitigating circumstance.'" Relying upon *von Lusch v. State*, 279 Md. 253, 264, 368 A.2d 468, 472 (1973), the majority determines that the

defendant waived his right to object to the admission of the evidence on the ground that it was inadmissible under Maryland Code (1957, 1982 Repl.Vol., 1983 Cum.Supp.), Art. 27, § 413 (c) (1) (iii). I do not agree.

The defendant's specific objections, as recognized by the majority, were that the testimony concerning the Montgomery County Detention Center incident was not relevant to either an aggravating or mitigating circumstance. In essence, the defendant's specific objections were that the testimony was inadmissible under Maryland Code (1957, 1982 Repl.Vol., 1983 Cum.Supp.), Art. 27, § 413 (c) (1) (i) and (ii). More particularly, with respect to mitigating circumstances, the defendant's specific objection was that this testimony was not relevant to the mitigating circumstance delineated in Maryland Code (1957, 1982 Repl.Vol., 1983 Cum.Supp.), Art. 27, § 413 (g) (7) — that the defendant was unlikely to engage in further criminal activity.

I do not, however, agree with the majority that by specifying § 413 (c) (1) (i) and (g) (7) the defendant waived an objection on the ground that the objected to testimony was inadmissible under § 413 (c) (1) (iii) and, therefore, failed to preserve that question for review. In my view, § 413 (c) (1) (i), (g) (7), and (c) (iii) are integrally related.[1] Both § 413 (c) (1) (i) and (c) (1) (iii) are component parts of § 413 (c) (1) that must be read in conjunction with one another. *Scott v. State*, Md. , , A.2d , (1983) [No. 116, Sept. Term, 1981 and No. 75, Sept. Term, 1982, filed 19 September 1983]. Testimony inadmissible under § 413 (c) (1) (iii) is inadmissible under § 413 (c) (1) (i) to disprove the existence of the mitigating circumstance delineated in § 413 (g) (7). Indeed, this Court has held that § 413 (c) (1) (i) and (iii) preclude "in a death penalty case, the admission of evidence of crimes of violence for which there have been no convictions. . . ." *Scott*, Md. at , A.2d at . In sum, § 413 (c) (1) (iii) is subsumed in § 413 (c) (1) (i).

1. § 413 (c) (1) provides in pertinent part:

"The following type of evidence is admissible in this proceeding:

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In the instant case, the defendant was not required to and did not in fact specify the reasons underlying his objection and supporting his contention that under § 413 (c) (1) (i) the objected to testimony was irrelevant to the mitigating circumstance delineated in § 413 (g) (7). Under these circumstances, the question before the trial court was whether the objected to testimony was inadmissible because under § 413 (c) (1) (i) it was irrelevant to the mitigating circumstance delineated in § 413 (g) (7). In order to resolve that question, the trial court was required to consider all of the reasons for which the objected to testimony might be irrelevant to the mitigating circumstance delineated in § 413 (g) (7).

Section 413 (c) (1) (i) and (iii) collectively establish that only evidence of unrelated crimes for which there has been a conviction is admissible and that evidence of unrelated crimes for which there has been a conviction is admissible and that evidence of unrelated crimes for which there has not been a conviction is inadmissible to prove or disprove the existence of any mitigating circumstance, including the mitigating circumstance delineated in § 413 (g) (7). *Scott*, Md. at . A.2d at . Accordingly, one of the reasons the trial court was required to consider in determining whether the objected to testimony was irrelevant to the mitigating circumstance delineated in § 413 (g) (7) was that it was unrelated to a crime for which there had been a conviction. The trial court determined that the objected to testimony was admissible under § 413 (c) (1) (iii) and, therefore, was admissible under § 413 (c) (1) (i) to disprove the existence of any mitigating circumstance, including the mitigating circumstance delineated in the § 413 (g) (7). Thus, in light of the integral relationship be-

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"(i) Evidence relating to any mitigating circumstance listed in subsection (g);

"(iii) Evidence of any prior criminal convictions, pleas of guilty or nolo contendere, or the absence of such prior convictions or pleas, to the same extent admissible in other sentencing procedures. . . ."

§ 413 (g) (7) establishes as a mitigation circumstance that:

"It is unlikely that the defendant will engage in further criminal activity that would constitute a continuing threat to society."

tween § 413 (c) (1) (i), (g) (7), and (c) (1) (iii), the trial court determined the question whether the objected to testimony was irrelevant to the mitigating circumstance delineated in § 413 (g) (7) and, therefore, inadmissible under § 413 (c) (1) (i) because it was inadmissible under § 413 (c) (1) (iii). There was nothing further that the defendant was required to do in order to preserve that question for appellate review. Md. Rule 522 a.[2] In short, the question presented to this Court was raised in and decided by the trial court and, therefore, was properly preserved for review.

Even if I agreed with the majority that the question whether the objected to testimony was inadmissible under § 413 (c) (1) (iii) was not properly preserved for review, I would, nonetheless, consider and determine that question. In *von Lusch*, 279 Md. at 262-64, 368 A.2d at 472, relied upon by the majority, this Court established a principle of waiver premised upon Maryland Rules 522 d and 725 f.[3] There, this Court said:

> "[W]here one objecting to the admission of evidence, although not requested by the court to state his grounds, goes ahead and delineates the specific grounds for his objection, he will be bound by those grounds and will *ordinarily* be deemed to have waived other grounds not mentioned." *von Lusch*.

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2. Md. Rule 522 a provides:

> "A formal exception to a ruling or order of the court is unnecessary."

3. Md. Rule 522 d 1 provides:

> "Unless requested by the court, it is not necessary to state the grounds for objections to evidence."

Md. Rule 725 f provided:

> "Exceptions shall be governed by the provision of Rules 522 (Objections to Ruling or Order — Method of Making), 510 (Reservation of Points for Court *In Banc*), and 564 b 3 (Trial by Court — No Instructions, Objections or Exceptions)."

Md. Rule 761, effective 1 July 1978, supplanted Md. Rule 725 f without any change relevant here.

> 279 Md. at 263, 368 A.2d at 472-73 (emphasis added).

The use of the word "ordinarily" makes it plain that under certain circumstances this Court may determine whether evidence was improperly admitted for reasons other than those specified at trial. Manifestly, this Court has discretion in the application of this waiver principle. I would exercise that discretion in this death penalty case.

The statutory scheme embodied in §§ 413 and 414 evidences the General Assembly's recognition that the unique severity of the death penalty necessitates unprecedented modes of appellate review that require extraordinary scrutiny by this Court.[4] More particularly, § 414(a) provides:

> "Whenever the death penalty is imposed, and the judgment becomes final, the Court of Appeals *shall* review the sentence on the record." (Emphasis added.)

This automatic direct appeal mandates that this Court review a death sentence even when unchallenged by the defendant. This legislative mandate suggests that unchallenged errors that occur at a death penalty sentencing proceeding should not be ignored. *See State v. Osborn*, 102 Idaho 405, 410-11, 631 P.2d 187, 192-93 (1981); *Commonwealth v. McKenna*, 476 Pa. 428, 439-44, 383 A.2d 174, 180-81 (1978). Indeed, the legislative mandate that the right to review a death sentence cannot be waived, supports the conclusion that the principles of waiver ordinarily applicable in criminal cases should not be rigidly applied by this Court in reviewing a death penalty sentencing proceeding.

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4. § 414 (e) provides:

> "In addition to the consideration of any errors properly before the Court on appeal, the Court of Appeals shall consider the imposition of the death sentence. With regard to the sentence, the Court shall determine:

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This Court has consistently recognized that the principles of waiver ordinarily applicable in criminal cases should not be rigidly applied in death penalty cases. *Johnson v. State*, 292 Md. 405, 412 n.3., 439 A.2d 542, 547 n.3 (1982); *Bartholomey v. State*, 260 Md. 504, 513, 273 A.2d 164, 169 (1971). More particularly, in *Bartholomey*, 260 Md. at 513, 273 A.2d at 169, this Court said:

> "Questions 1, 3, and 5 do not appear to have been raised below and *ordinarily* we will not consider such questions on appeal pursuant to Maryland Rule 885. This, however, is a case involving the death penalty and we have decided to consider and determine all of the questions briefed and argued by the appellant before us whether or not tried and decided by the lower court." (Emphasis in original).

Similarly, in *Johnson*, 292 Md. at 412 n.3, 439 A.2d at 547 n.3, Judge Digges, writing for the majority, said:

> "[W]e shall assume without deciding that appellant's claim is properly preserved for review. We note, however, that, while 'ordinarily' we will not consider questions not properly preserved for appeal pursuant to Maryland Rule 885, in a previous death penalty case we demonstrated a less strict application of this principle and exercised our discretion to consider and determine questions briefed and argued before us whether or not properly preserved for review. See Bartholomey v. State, 260 Md. 504, 513, 273 A.2d 164, 169 (1971)."

"(1) Whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor;

"(2) Whether the evidence supports the jury's or court's finding of a statutory aggravating circumstance under § 413 (d);

"(3) Whether the evidence supports the jury's or court's finding that the aggravating circumstances are not outweighed by mitigating circumstances; and

"(4) Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant."

Courts in other jurisdictions employing a variety of rationales have similarly concluded that the principles of waiver ordinarily applicable in criminal cases should not be applied in death penalty cases.[5] Illustrative is the case of *State v. Britt*, 235 S.C. 395, 424, 111 S.E.2d 669, 684 (1959), in which the Supreme Court of South Carolina said:

> "The power of the law to take the life of human beings for a violation of the law is one which should be and is exercised with extreme caution. The frailities of human nature are so manifold and manifest until the law should and does place around the defendant, whose life will be taken for a violation of the law, every safeguard to enable such defendant to secure a fair and impartial trial. This Court has taken the position that in all cases involving the life of the defendant, it is not bound down to a consideration of the exceptions raised, but if anything appears in the record which would warrant a reversal of the cause, this Court will consider that matter as if raised by the exceptions."

Moreover, in death penalty cases, this Court has repeatedly considered and determined questions briefed and

5. *E.g.*, Fisher v. United States, 328 U.S. 463, 467-68, 66 S.Ct. 1318, 1320-21 (1946); Stewart v. United States, 247 F.2d 42, 47 (D.C.Cir. 1957); Austin v. United States, 208 F.2d 420, 421 (5th Cir. 1953); Suhay v. United States, 95 F.2d 890, 893 (10th Cir.), *cert. denied*, 304 U.S. 580, 58 S.Ct. 1060 (1938); Butler v. State, 285 Ala. 387, , 232 So.2d 631, 632-33 (1970), *cert. dismissed*, 406 U.S. 939, 92 S.Ct. 1807 (1972); State v. Jeffers, 135 Ariz. 404, 432, 661 P.2d 1105, 1133 (1983); State v. Osborn, 102 Idaho 405, 410-11, 422-23, 631 P.2d 187, 192-93, 204-05 (1981); People v. Szabo, 94 Ill.2d 327, , 447 N.E.2d 193, 206 (1983); State v. Martin, 243 Iowa 1323, 1326-28, 55 N.W.2d 258, 260-61 (1952); State v. Spencer, 186 Kan. 298, 302, 349 P.2d 920, 923 (1960); Smith v. Commonwealth, 366 S.W.2d 902, 906 (1963); Commonwealth v. Harris, 371 Mass. 462, 470-71, 358 N.E.2d 982, 987-88 (1976); People v. Wood, 12 N.Y.2d 69, 78, 187 N.E.2d 116, 122, 236 N.Y.S.2d 44, 52 (1962); State v. Williams, 308 N.C. 47, , 301 S.E.2d 335, 353-54 (1983); Tuggle v. State, 73 Okla.Crim. 208, 211-12, 119 P.2d 857, 859 (1941); State v. Nodine, 198 Or. 679, 687, 259 P.2d 1056, 1059 (1953); Commonwealth v. McKenna, 476 Pa. 428, 437-41, 383 A.2d 174, 179-81 (1978); State v. Patterson, 278 S.C. 319, , 295 S.E.2d 264, 264-65 (1982); State v. Brown, 607 P.2d 261, 264-65 (Utah 1980); State v. Morris, 41 Wyo. 128, 146-47, 283 P. 406, 411 (1929). *But see* Hulsey v. State, 261 Ark. 449, 432, 549 S.W.2d 73, 75 (1977), *cert. denied*, 439 U.S. 882, 99 S.Ct. 220 (1978).

argued before us even when not properly preserved for appellate review. *Poole v. State*, 295 Md. 167, 185-86, 187-88, 453 A.2d 1218, 1228, 1229-30 (1983); *Johnson*, 292 Md. at 412 n.3, 439 A.2d at 547 n.3; *Tichnell v. State*, 287 Md. 695, 714-15, 415 A.2d 830, 840 (1980); *Bartholomey*, 260 Md. at 513, 273 A.2d at 169. Indeed, in *Calhoun*, the very case presently before us, the majority recognizes and applies this virtually universal principle. The majority twice expressly exercises its discretion to consider and determine questions that have not been properly preserved for appellate review. Thus, Judge Smith, writing for the majority, states:

> "There is both a short and a long answer to Calhoun's contentions. The short answer is that counsel said, '[W]e are satisfied[,]' after the last juror was sworn subsequent to the exhaustion of Calhoun's preemptory challenges. The State then announced its satisfaction. *Thus, the point is waived. However, because of the nature of the case we shall give the 'long answer' to Calhoun's contentions.*" (Citation omitted. Emphasis added.)

Similarly, Judge Smith subsequently states:

> "As in iii, there is a short and a long answer to Calhoun's contention. The short answer is that no request for such instruction was made at trial nor was any objection made upon that basis to the instructions which were given as required by Rule 757 (f). Rule 757 (h) provides that an objection is not reviewable as of right unless it is made in compliance with Rule 757 (f). We are urged that we should take cognizance of this as 'plain error' within the meaning of Rule 757 (h). In *State v. Hutchinson*, 287 Md. 198, 203, 411 A.2d 1035 (1980), we indicated that *an appellate court should take cognizance of unobjected to error only when the error is so 'compelling, extraordinary, exceptional or fundamental [as] to [deny] the defendant a fair*

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trial.' There is no such error in this case. Because this is a capital case in which we are affirming a sentence of death, however, we shall give the long answer to Calhoun's contention." Emphasis added.)

Additionally, in death penalty cases, this Court has repeatedly considered and determined questions briefed and argued before it without any discussion or comment concerning allegations that those questions had not been properly preserved for appellate review. *Poole*, 295 Md. at 182, 453 A.2d at 1226-27 and Appellee's Brief at 6; *Johnson*, 292 Md. at 430-31, 439 A.2d at 557 and Appellee's Brief at 18-20; *Poole v. State*, 290 Md. 114, 125, 428 A.2d 434, 440 (1981) and Appellee's Brief at 25; *Tichnell*, 287 Md. at 714, 717-19, 415 A.2d at 840, 842-43, and Appellee's Brief at 23, 24. Indeed, in the instant case, the majority, in Section iv Approver and Section ix C Constitutional Issues, determines questions without any discussion or comment concerning the State's allegations that those questions had not been properly preserved for appellate review.[6]

Notwithstanding the legislative requirement of extraordinary scrutiny by this Court in death penalty sentencing

6. This Court has decided ten death penalty cases since the enactment of Art. 27, §§ 413-415. Tichnell v. State, Md. , A.2d (1983) [No. 3, September Term, 1981, filed 4 November 1983]; Scott v. State, Md. , A.2d (1983) [No. 116 Sept. Term, 1981 & No. 75 Sept. Term, 1982, filed 19 September 1983]; Foster v. State, Md. , 461 A.2d 504 (1983); Harris v. State, 295 Md. 329, 455 A.2d 979 (1983); Poole v. State, 295 Md. 167, 453 A.2d 1218 (1983); Huffington v. State, 295 Md. 1, 452 A.2d 1211 (1982); Johnson v. State, 292 Md. 405, 439 A.2d 542 (1982); Poole v. State, 290 Md. 114, 428 A.2d 434 (1981); Tichnell v. State, 290 Md. 43, 427 A.2d 991 (1981); Tichnell v. State, 287 Md. 695, 415 A.2d 830 (1980). In each of these cases, a multiplicity of questions were presented for review. In *Tichnell I*, the first of these death penalty cases, 14 questions were briefed and argued. Appellee's Brief at i-ii, Tichnell v. State, 287 Md. 695, 415 A.2d 830 (1980). The State alleged that five of those questions had not been properly preserved for appellate review and, therefore, had been waived. This Court found only one of those questions to be without merit on the sole ground that it had been waived. Tichnell, 287 Md. at 713-14, 415 A.2d 840. In the nine cases decided subsequent to *Tichnell I*, this Court has never refused to consider and determine any of the multiplicity of questions briefed and argued before it on the sole ground that it had not been properly preserved for appellate review.

proceedings and this Court's own previous and present express agreement with the virtually universal rule that the principles of waiver ordinarily applied in criminal cases should not be rigidly applied in death penalty cases, the majority here, without explanation or comment, applies a waiver principle. In my view, principles of waiver ordinarily applied with respect to questions not properly preserved for appellate review should not be rigidly applied in a death penalty case. Rather, in such a case, discretion should be exercised to consider and determine questions briefed and argued even if not properly preserved for appeal. Thus, unlike the majority, I would consider and determine the question, raised and argued here — whether testimony concerning the Montgomery County Detention Center incident was inadmissible under § 413 (c) (1) (iii).

In *Scott*, the question presented was whether under § 413 (c) (1) evidence is admissible at a sentencing proceeding to show that an accused convicted of premeditated murder has committed other unrelated crimes for which the accused has not been convicted. The accused there contended that under § 413 (c) (1) (i) and (iii), admissible evidence of unrelated crimes is restricted to evidence of prior convictions. The State contended that evidence of unrelated crimes for which the accused has not been convicted is admissible at a sentencing proceeding under § 413 (c) (1) (v). This Court stated that the language of § 413 (c) (1) (i) through (iv) "collectively unambiguously restricts the type of evidence admissible in a sentencing proceeding in a death penalty case to something less inclusive than what generally is admissible in a sentencing proceeding in a nondeath penalty case." *Scott*, Md. at , A.2d at . More particularly, we concluded that § 413 (c) (1) (i) and (iii) preclude "in a death penalty case, the admission of evidence of crimes of violence for which there have been no convictions. . . ." *Scott*, Md. at , A.2d at . Additionally, we indicated that those sections not only restrict the type of admissible evidence of unrelated crimes to crimes for which the defendant had been convicted, but also to crimes defined

as crimes of violence under § 413 (g) (1).[7] *Scott*, Md. at , A.2d at . Finally, we concluded that the language of § 413 (c) (1) (v) "cannot be construed as authorizing evidence of unrelated crimes to be admitted in a death penalty case, even where there has been no conviction. . . ." *Scott*, Md. at , A.2d at .

The record here shows that the State neither proffered nor introduced any evidence to show that the defendant has been convicted of any crime relating to the Montgomery County Detention Center incident. Manifestly, the State has failed to satisfy its burden of proof. Moreover, the dockets of both the Circuit Court for Montgomery County and the District Court of Maryland sitting in Montgomery County reveal that subsequent to July 1981 the defendant had not been convicted of any crimes other than those relating to the instant case.[8] Consequently, I, unlike the majority, can only conclude that the defendant had not been convicted of any crime related to the Montgomery County Detention Center incident. Under these circumstances, the holding in *Scott* that in a death penalty case § 413 (c) (1) (i) and (iii) preclude the admission of evidence of unrelated crimes for which there have been no convictions is dispositive here. Accordingly, I would hold that the testimony concerning the Montgomery County Detention Center incident was inadmissible under § 413 (c) (1) (iii).[9]

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7. § 413 (g) (1) provides in pertinent part:

> "As used in this paragraph, 'crime of violence' means abduction, arson, escape, kidnapping, manslaughter, except involuntary manslaughter, mayhem, murder, robbery, or rape or sexual offense in the first or second degree, or an attempt to commit any of these offenses, or the use of a handgun in the commission of a felony or another crime of violence."

8. An appellate court may take judicial notice of the records of other courts within this State when required by the "demands of justice." Davidson v. Miller, 276 Md. 34, 67 n.7, 344 A.2d 422, 430 n.7 (1975); Fletcher v. Flournoy, 198 Md. 53, 60-61, 81 A.2d 232, 235 (1951); Campbell v. State, 37 Md.App. 89, 97 n.5, 376 A.2d 866, 870-71 n.5 (1977); James v. State, 31 Md.App. 666, 864-87, 358 A.2d 595, 606-07 (1976).

9. The majority here asserts that "[t]he conduct of Calhoun in this instance, if established in a criminal proceeding against him, would be the common law offense of battery." That offense is not a crime of violence as defined in § 413 (g) (1). Thus, the testimony concerning the Montgomery

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

RICHARD DANNY TICHNELL

and

JAMES ARTHUR CALHOUN,

Petitioners

v.

STATE OF MARYLAND,

Respondent

APPENDIX TO PETITION FOR

WRIT OF CERTIORARI

APPENDIX G

Order of the Court of Appeals of Maryland denying motion for rehearing in Calhoun v. State, 297 Md. 563, ___ A.2d ___ (1983), filed on December 5, 1983 ..... G.1

JAMES ARTHUR CALHOUN	*	In The
	*	Court of Appeals
v.	*	of Maryland
	*	No. 129 - September Term, 1981
STATE OF MARYLAND	*	No. 5 - September Term, 1982

* * * * * *

ORDER

Upon consideration of the motion for reconsideration and to delay issuance of the mandate pending reconsideration filed in the above entitled case, it is this 5th day of December, 1983

ORDERED, by the Court of Appeals of Maryland, that the motion be, and it is hereby, denied.

/s/ Robert C. Murphy
Chief Judge

Judge Davidson would have granted the motion.

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APPENDIX H

Order of Honorable Warren E. Burger, Chief Justice of the United States, extending Time to File Petition for Writ of Certiorari To and Including March 4, 1984 ..... H.1

Supreme Court of the United States

No. A-597 , *October Term, 19* 83

JAMES ARTHUR CALHOUN,

Petitioner,

v.

MARYLAND

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner~~(s)~~x

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including March 4, 1984

/s/ Warren E. Burger

Chief Justice of the United States.

Dated this 25th

day of January, 19 84

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